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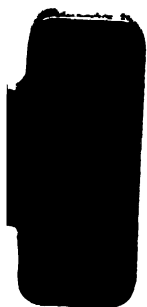
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A SELECTION
OF
SUPREME COURT CASES
IN
NEW SOUTH WALES,
FROM 1825 TO 1862.

COMPILED BY
J. GORDON LEGGE, M.A., LL.B.
(BARRISTER-AT-LAW.)

Sydney:
CHARLES POTTER, GOVERNMENT PRINTER, PHILLIP-STREET.

1896.

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PREFACE.

FROM the foundation of the Supreme Court under the statute 9 Geo. IV, cap. 83, to the year 1862, no authorised reports of the decisions of the Court were published, excepting a small volume of "Reserved Judgments," reprinted from the *Sydney Morning Herald*. The majority of the cases decided during that period were, however, well reported by the *Sydney Gazette*, the *Sydney Herald* (afterwards the *Sydney Morning Herald*), and other newspapers (1). Three hundred cases, selected from this period, have been reprinted here, their value consisting in the fact that they deal with one or more of the following subjects, viz., the applicability of English statutes and Common law principles to New South Wales, the construction of Colonial statutes, which are either still in force or replaced by similar enactments, the jurisdiction of Colonial Courts, and Common law points *primae impressionis* or peculiar to the circumstances of the Colony.

That Mr. (afterwards Sir *Archibald*) *Michie*, and Mr. *C. J. H. St. Julian* (author of the well known work on Municipalities) carried out the law reporting of the *Sydney Morning Herald* during the period embraced in these two volumes, is a guarantee of the value and accuracy of these reports; they have, further, been collected and noted by several of the Judges of the Court, and, on more than one occasion, cited with approval from the Bench (2).

Of course printers' errors occur, but, for many obvious reasons, it has been considered best to reprint the judgments as they have been found, except where they have been

(1) Files of these can be seen at the Government Free Public Library or in the Office of the Colonial Secretary.

(2) See, among other references, the *Sydney Morning Herald*, July 28, 1851, the *Devine Case*, and August 1, 1860, *Purves v. the Attorney-General*.

corrected by their Honors in their collection of printed judgments. In addition the compiler has had the privilege of consulting the note books of most of Judges, by whom the decisions have been given, and thus verifying the reports, none of which have been found to contain errors that were not patent and superficial. That such is the case will argue in favor of those reports, which could not be thus verified, but, as a further safeguard, the former class have been distinguished by an asterisk in the list of cases.

Several decisions will be found in this work, which have already appeared (in the form of an appendix) in the volumes of the *Supreme Court Reports*, but, as the latter are out of print, and will doubtless be shortly reprinted, it was thought advisable to include such cases with the others of the same period.

The thanks of the compiler are due to His Honor, the present Chief Justice, Sir *Frederick Darley*, the late Chief Justice, Sir *Alfred Stephen*, and Mr. Justice *Stephen*, for the use of Judges' note-books and collections of printed judgments, to the proprietors of the *Sydney Morning Herald* for permission to reprint these reports, and to many members of the legal profession for valuable assistance.

J. G. L.

Lyndhurst Chambers,
September, 1894.

NOTE.—Since the completion of this work considerable and unexpected delay has occurred in the printing, and the indulgence of the legal profession is asked for such inaccuracies as may have been overlooked in the proofs, the reading of which has been done in very brief moments of leisure.

June, 1896.

CHIEF JUSTICES OF NEW SOUTH WALES, 1825 TO 1862.

Names.	Held Office.		Remarks.
	From	To	
Forbes, Sir Francis, Knt....	13 Oct., 1823	1 July, 1837	Knighted, 6 April, 1837. Died, 8 Nov., 1841.
Dowling, Sir James, Knt...	30 Aug., 1837	27 Sept., 1844	Knighted, 30 Aug., 1837. Died 27 Sept., 1844.
Stephen, Sir Alfred, C.B., G.C.M.G.	7 Oct., 1844	6 Nov., 1873	Still in office in 1862.

ACTING CHIEF JUSTICES.

Dowling, James.....	16 April, 1836	29 Aug., 1837	Appointed C.J., 30 Aug., 1837.
Dickinson, Sir John Nodes	15 Feb., 1860	17 Feb., 1861	Retired, 17 Feb., 1861. Knighted, 1860.

JUDGES OF THE SUPREME COURT.

Wylde, John, LL.B.	23 Mar., 1824	12 Feb., 1825	Returned to England, 12 Feb., 1825.
Stephen, John	17 Aug., 1825	1 Jan., 1833	Died, 21 Dec., 1833.
Dowling, James.....	16 Aug., 1827	15 April, 1836	Appointed Acting C.J., April, 1836.
Burton, Sir William West- brook, Knt.	11 Oct., 1832	6 July, 1844	Appointed Judge of Supreme Court, Madras, 1844.
Kinchela, John, LL.D.....	16 April, 1836	4 Nov., 1837	Died, 21 July, 1845.
Willis, John Walpole	4 Nov., 1837	—, 1843	Appointed Judge at Port Phillip, 1841.
Stephen, Alfred.....	30 April, 1839	6 Oct., 1844	Appointed C.J., 7 Oct., 1844.
A'Beckett, William	15 July, 1844	31 Jan., 1846	Appointed Judge at Port Phillip, 1846.
Dickinson, John Nodes ...	13 Oct., 1844	14 Feb., 1860	Appointed Acting C.J., 15 Feb., 1860.
Therry, Roger	1 Feb., 1846	31 Jan., 1859	Appointed Judge at Port Phillip, 1845. Appointed P.J. in Equity, 1846.
Manning, William Monta- gue.	12 Jan., 1848	18 Nov., 1849	During absence of Mr. Justice Therry.
Milford, Samuel Frederick	1 Jan., 1856	26 May, 1865	Appointed Judge at Moreton Bay, 1856 to 1859. Appointed P.J. in Equity, 1859.
Wise, Edward	15 Feb., 1860	28 Sept., 1865	

ATTORNEYS GENERAL.

Bannister, Saxe. 1824, to October, 1826.
 Moore, William Henry (acting). October, 1826, to July 31, 1827.
 Baxter, Alexander Macduff. August, 1, 1827, to June, 1831.
 Kinchela, John, LL.D. June, 1831, to April, 1836.
 Plunkett, John Hubert. April, 1836, to March, 1841.
 Therry, Roger. March, 1841, to August, 1843.
 Plunkett, John Hubert. August, 1843, to June, 1856.

[Under the new Constitution.]

Manning, William Montague. June 6, 1856, to August 25, 1856.
 Martin, James. August 26, 1856, to October 2, 1856.
 Manning, William Montague. October 3, 1856, to May 25, 1857.
 Darvall, John Bayley. May 26, 1857, to September 7, 1857.
 Martin, James. September 8, 1857, to November 8, 1858.
 Lutwyche, Alfred James Peter. November 15, 1858, to February 28, 1859. (Appointed Judge at Moreton Bay, 1859.)
 Bayley, Littleton H. March 1, 1859, to October 26, 1859.
 Wise, Edward. October 27, 1859, to February 13, 1860.
 Manning, Sir William Montague, Knt. February 21, 1860, to March 8, 1860.
 Hargrave, John Fletcher. April 2, 1860, to July 31, 1863.

SOLICITORS GENERAL.

Stephen, John. 1824 to August 17, 1825. (Acting Judge of the Supreme Court during part of this period.)
 Holland, James. 1826 to 1827.
 Foster, William. 1827 to 1828. (Arrived August 21, 1827.)
 Sampson, John. 1828 to 1831. (Arrived March 12, 1828.)
 M'Dowall, Edward. 1831 to 1832.
 Plunkett, John Hubert. 1831 to 1836. (Arrived June 14, 1832.)
 Manning, William Montague. 1844 to 1848.
 Foster, William. 1848 to 1849.
 Manning, William Montague. 1849 to 1856.

[Under the new Constitution.]

Darvall, John Bayley. June 6, 1856, to August 25, 1856.
 Lutwyche, Alfred James Peter. September 12, 1856, to October 2, 1856.
 Darvall, John Bayley. October 3, 1856, to May 25, 1857.
 Wise, Edward. May 26, 1857, to September 7, 1857.
 Lutwyche, Alfred James Peter. September 8, 1857, to November 14, 1858.
 Dalley, William Bede. November 15, 1858, to February 11, 1859.
 Hargrave, John Fletcher. February 21, 1859, to October 26, 1859. November 3, 1859, to March 8, 1860.

[NOTE.—It has not been possible to obtain accurately the whole of the dates of the above appointments.]

CORRIGENDA.

- Page 73, last line, for *allowed* read *disallowed*.
- „ 74, heading, for *Reg.* read *Rex*.
- „ 399, headnote, lines 2 and 7, for *femme* read *feme*.
- „ 443, headnote, line 2, for *baliff* read *bailiff*.
- „ 470, headnote, line 9, for *when* read *where*.
- „ 519, line 9, for *Simplyfying* read *Simplifying*.
- „ 659, headnote, lines 3 and 5, for *Sherriff's* read *Sheriff's*.
- „ 753, headnote, 2nd para., line 1, for *hand* read *land*.
- „ 819, headnote, line 3, for *do* read *does*.
- „ 846, headnote, line 7, for *are* read *is*.
- „ 1012, headnote, line 1, for *to* read *the*.
- „ 1458, headnote, line 8, for *supercession* read *supersession*.

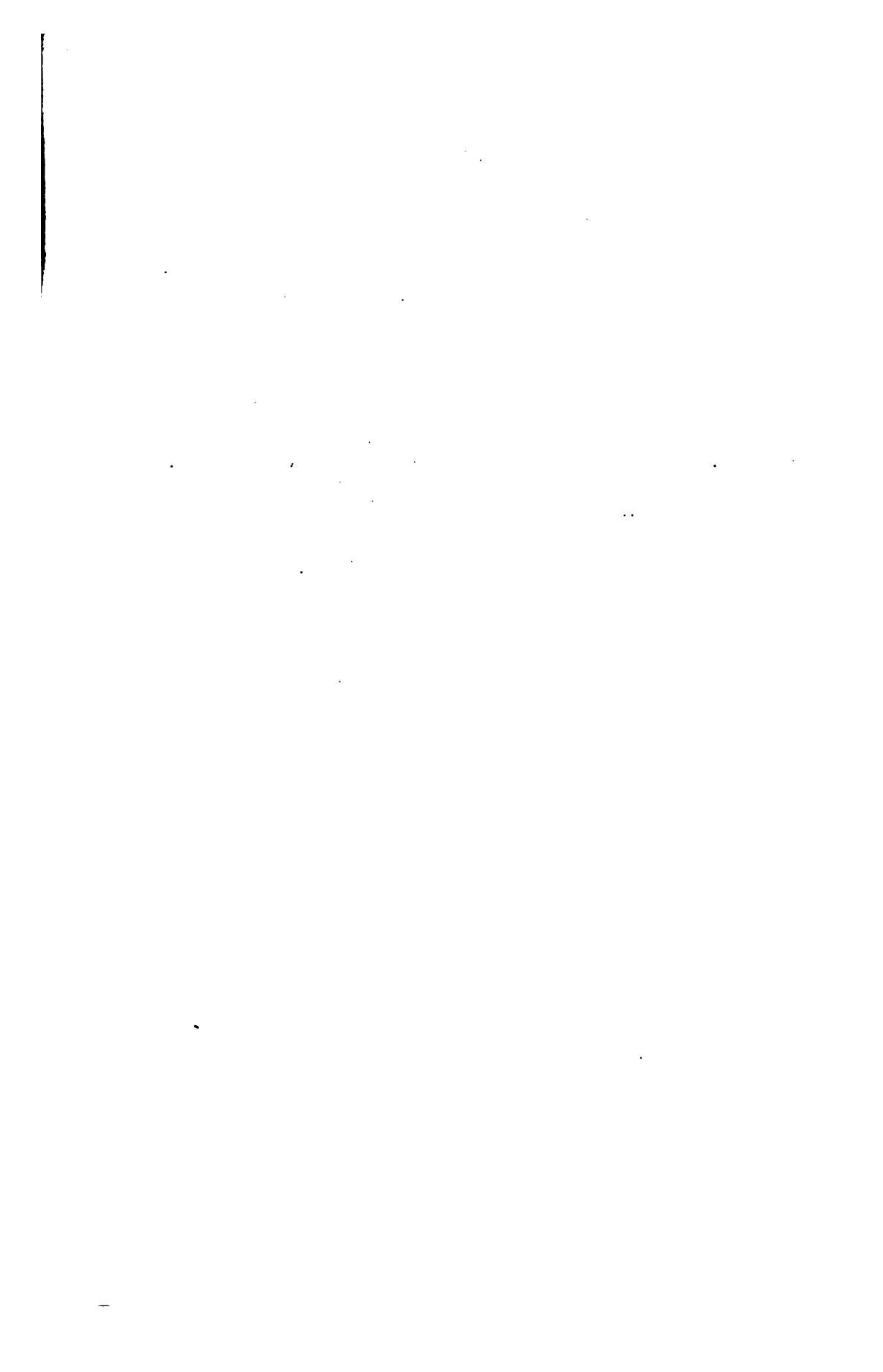


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A SELECTION OF SUPREME COURT CASES IN NEW SOUTH WALES, FROM 1825 TO 1862.

GEARY v. VIVIAN. (1)

1830.

Master and Seaman—Desertion—59 Geo. III cap. 58—9 Geo. IV c. 83.

*Aug. 27.
Sept. 17.*

Quære, whether under the *New South Wales Act* Justices of this Colony have jurisdiction to entertain complaints of seamen, upon contracts entered into outside the Colony, as they undoubtedly have upon contracts made within it.

Forbes C.J.

Absence of a seaman from his ship for three hours without leave does not necessarily work a forfeiture of wages, although so provided by the agreement of service.

THIS was an appeal from Justices under the Statute 59 *Geo. III cap. 58* before the *Chief Justice*.

Vivian, a mariner on board of the ship *Gilmore*, signed the usual articles to perform a voyage from *London*, via *Swan River*, to *Sydney*. Some time after the arrival of the ship in this port, the Respondent asked leave to go on shore, and though refused permission did go, and remained absent for three hours. This was considered by the master, the Appellant, to be a breach of the articles, and he discharged the Respondent, who, thereupon, applied to the Magistrates in General Sessions for his wages, under the Act 37 *Geo. III cap. 73*, which provides that there shall be an absence from the ship of twenty-four hours in order to constitute a desertion. Upon the inquiry before the Justices, it was contended that the Statute, under which the claim for wages was preferred, did not apply to this Colony, but the Bench overruled the objection, deciding that, to constitute a desertion there must be twenty-four hours' absence, and that the then complainant was entitled to his wages. From this decision Captain *Geary* appealed.

(1) *Sydney Gazette*, Sept. 18, 1830.

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Therry for the Appellant. The articles of agreement provide that an absence of one hour shall be considered a desertion from the ship. 4 Geo. IV. *cap.* 25 s. 9.

Dr. Wardell for the Respondent. The agreement contravenes the Act of Parliament. The Acts which render a forfeiture the consequence of a violation of "articles" refer to "the articles" expressly directed by the legislature.

Cur. adv. vult.

Sept. 17.

The CHIEF JUSTICE. This case comes before the Court upon an appeal from the decision of two of His Majesty's Justices of the Peace in Sydney, made upon the complaint of a seaman of the ship *Gilmore*, against the master, for dismissing him from the ship, and afterwards refusing to pay him any wages. The proceedings before the Justices, as well as the appeal, are founded upon the jurisdiction assumed to be given by the Statute, 59 Geo. III, *cap.* 53. A very important question arises, whether this Court, or the parties before whom the complaint was originally heard, derive a jurisdiction, in this case, under the Statute referred to. Before I touch upon that question, however, I will briefly review the facts of the case, and state the grounds upon which I am of the opinion that the decision of the Justices was right, upon the merits, independently of the point of jurisdiction.

It appears, by the articles between the master and the seamen of the ship *Gilmore*, that the seamen engaged to proceed on a voyage from London to Swan River, and from thence to such place as the master shall direct, until the ship's return to the port of London; and, among other stipulations, it was expressly agreed, *that in case any one of the seamen should quit the ship, for the space of one hour, without leave being first obtained from the master, such seaman should forfeit all the wages then due to him, together with his clothes and effects.* It further appears by the depositions taken before the Magistrate, that while the *Gilmore* was lying in the harbour of Port Jackson, one of the seamen, the present complainant, asked permission of the master to go on shore, for the purpose, as he asserts, of having his clothes washed, and that he was refused by the master; notwithstanding which refusal however, he did go on shore, and remained there, by his own admission, for four hours. On his way back to the ship, he was met by the master, and put in charge of constables, who conducted him as a prisoner on board the *Gilmore*. The complainant further states that he went to his duty, as usual, at 8 o'clock in the morning of the 12th of May, and continued until 10 o'clock, when he was informed that his rations were stopped, and he was no longer to be considered as belonging to the ship.

Upon this state of facts, the seaman made his complaint to the Justices, who considered his discharge as not being warranted by his conduct, and they awarded the sum of fifteen pounds six shillings and four pence to be paid to him, by the master, as the balance of the wages, then due, for so much of the voyage as he had performed.

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I should not feel disposed to disturb this decision, however, I might entertain some difference of opinion as to the correctness of the conclusions drawn from the mere facts in evidence. On the other hand, disobedience of orders is a very serious breach of agreement in a seaman. In no civil contract is the obligation of implicit performance more necessary than in that between the master and seamen of a ship. The success of the voyage, the security of the ship, the property of the owners, and the lives of the crew, depend upon the observance of the first of duties. The injurious consequences which may be sustained, therefore, by a failure in this contract, are not to be estimated by the mere value of the service unperformed. It is the act of disobedience, with its influence, its pernicious example, and its train of possible consequences, which is to be considered. In this point of view, I should hold, as a principle, that the absence of less than one hour, might, under given circumstances, become a just cause for the discharge of the seaman, and the entire forfeiture of his wages. But at the same time, and in the spirit of the same rule, it is not every act of the seaman, although in contravention of his express agreement, that should work so large a forfeiture. The reasonable requests of seamen to the masters, to be allowed to go on shore, occasionally, for particular purposes, should be complied with, unless there be some sufficient reason to refuse them. It can hardly be presumed, that in contracting never to go out of the ship for one hour during the voyage, which, in the natural course of things must occupy nearly two years, without the leave of the master, such leave might be arbitrarily and unreasonably withheld. In the case of the *Minerva* (1) it was held, that in the construction of seamen's articles "the Court of Admiralty will, as a Court of Equity, consider how far the engagements are reasonable or not, and will bear in mind the general ignorance and improvidence of seamen, and their inability to appreciate the meaning and effect of a long and multifarious instrument." And in the case of *Neave v. Pratt* (2), a case, in some respects like the present, where a mariner had quitted the ship, contrary to the terms of his agreement, without leave of the master, being refused his wages, brought an action against the master to

(1) Hag. Adm. 347.

(2) 2 New. Rep. 408.

1830. recover them. Mr. Justice Chambre, before whom the cause was tried,
 GEARY told the Jury, that, under such clause he did not think the master could
 v. refuse leave without a sufficient reason, and this opinion of the learned
 VIVIAN. Judge was afterwards confirmed by the Court of Common Pleas.
 Forbes, C.J.

Upon the merits of this case, therefore, I should incline to leave the decision of the Justices where I find it; as I believe that, under the facts stated in evidence, the same conclusion would probably be drawn by the Justices in England. But I have serious doubts how far the case itself comes within the jurisdiction of the Justices in this Colony. I apprehend that some degree of error prevails as to the true meaning of that section of the New South Wales Act which directs, that all the laws in force, in England, at the passing of the Act, should be applied by the Courts here, in the administration of justice. I conceive that this clause in the Act referred to means, that all the Acts of Parliament, and the Act 59th Geo. III cap. 58 *inter alia*, shall be considered as part of the municipal laws of the Colony—the *lex loci*—under which Justices of the Peace may entertain complaints made by seamen, upon contracts entered within the Colony, and determine them in the summary manner pointed out by the Act—not that it shall be lawful for any Justices of the Peace in New South Wales, to have the same jurisdiction in cases of contracts between masters and mariners, entered into in England, as Justices residing in England.

The policy of the Statutes for regulating the hiring of seamen, in England, requires that their wages should not be paid to them abroad. The objects of the legislature have been many—to prevent desertion from the ship during the voyage; to secure the return of seamen to their country; to prevent this improvident class of persons from being defrauded of their wages, under the pretext of their being paid by advances at different periods; and in the event of their return to their country, or their loss by the perils of their profession, to prevent themselves and their families from becoming a charge upon the parishes to which they belong. In furtherance of these wise objects of the legislature, it is made a misdemeanor by a very late Act of Parliament 9 Geo. IV, cap. 31, sec. 30, in any master of a Merchant vessel wilfully to leave behind any seaman, in any of His Majesty's colonies or elsewhere; or to refuse to bring him home. Looking therefore at the policy of the laws, and the enactment of the last Statute, I have very grave doubts how far the Justices had a jurisdiction in this case. I will not however disturb their decision; but I would suggest to them the expediency of stating a case and requesting His Excellency the Governor to transmit it to England, and obtain the opinion of His Majesty's law officers, upon the point of their jurisdiction in cases like the present.

REX v. FARRELL, DINGLE, AND WOODWARD. (1)

1831.

9 Geo. IV c. 83—Competency of attainted felon to give evidence—Application of English Common Law to this Colony—Larceny of paper—Knowledge of receiver of stolen goods—Appeal to King in Council.

June 28.
July 23.

Forbes C.J.
Stephen J.
and
Dowling J.

At the trial of prisoners charged with burglary, the evidence of an accomplice was admitted for the prosecution, notwithstanding an objection by the counsel for the defence on the ground that he was a convict attainted, which fact was admitted, and the point reserved for the consideration of the Full Court.

Held, that he was a competent witness *within this Colony*, that sec. 24, of the New South Wales Act, 9 Geo. IV. c. 83, had in view the *common* as well as the *Statute* law of England, and that the Court under this Statute had power to prescribe rules of Practice and Evidence, *per* STEPHEN and DOWLING, JJ., the CHIEF JUSTICE *dissentiente*.

Held, *per* the CHIEF JUSTICE, that the New South Wales Act did not introduce the laws of England into this Colony, but was merely declaratory, and that whenever the law of England *could* be applied, the Court must apply it.

Held also, on the second objection, that the third prisoner was no less guilty of receiving, though he may not have known by whom the property was stolen.

Held also, on the third objection, that it was unnecessary to describe pieces of paper which the prisoners were charged with stealing.

Leave to appeal to the King in Council refused.

CROWN CASE RESERVED.

The prisoners, Farrell and Dingle, were indicted at the last Criminal Sessions, before *Dowling*, J., as principals in the first and second degree, for breaking and entering the dwelling house of Thomas M^r Vitie, Esq., at Sydney, and stealing therein above the value of £5; and the prisoner, Woodward, for receiving part of the property, knowing it to have been stolen, and a verdict of guilty was returned.

Stephen for the prisoner Farrell.

June 28.

Therry for Dingle, and

Foster for Woodward, showed cause why sentence should not be passed.

The facts appear in the judgments.

The CHIEF JUSTICE. Prisoners at the bar,—You are placed there to receive the judgment of the Court. This was a case of burglary. The information charged you, George Farrell, and you, James Dingle, as principals in the first and second degree; and you Thomas Woodward, as an accessory after the fact. From the notes of His Honor

July 23.

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Mr. Justice Dowling, before whom you were tried, it appears that your case underwent the most laborious consideration ; and, with respect to the conclusion at which the Jury arrived, upon the facts detailed in evidence against you, I have now nothing to offer. At the trial, it appears that one William Blaxstone was put into the box, as a witness for the prosecution ; it was admitted that he was an accomplice—he was objected to on the ground of his being a convict attaint, under an unsatisfied sentence for an offence committed in this Colony—his person was identified, and the record of his conviction, and the judgment upon it, proved. The presiding Judge, however, overruled the objection, and admitted him to be sworn and examined as a witness. His evidence went to the Jury, but the question of his admissibility was saved for the future consideration of the Court, and was subsequently argued by your Counsel. The only question raised in the case is, “ Whether such a person, proved to be an attainted felon, and his person identified in the witness-box, could be admitted as a competent legal witness, *in this Colony?*” because, *out of this Colony*, no such question could have been raised. It is my misfortune to entertain a different opinion on this point from that of my learned brethren on the Bench ; and it is with pain, therefore, that I am called upon to express the grounds upon which that opinion rests, as well as the regret which I cannot but feel, that any difference of opinion should prevail upon a question of such vital importance. The necessity of the case, however, has been thought to require that this question should be raised, and I must not shrink from the performance of a public duty, in stating my opinion upon the point, however I lament that it is at variance with the opinions entertained by my learned coadjutors. The question, then, and the only question, I repeat, is, “ Whether, in this Colony, there be a local law, or custom having the force of law, which will warrant such a direct departure from the law of the parent state, as to justify the admission of such a witness, *in this Colony?*” The rule of law is too clear for argument, that an attainted felon cannot be sworn as a witness ; and I will refer to the case of the *King against Gully* (1), not so much to establish the position, as in illustration of the unvarying practice of the Courts in the mother country to reject such testimony, as a matter of course, and as showing the tenacity of the Judges in upholding that principle of law which, I apprehend, in the present case, goes to the exclusion of this witness.—“ At the Old Bailey, in July Session, 1773, *Patrick Murphy* and three others were indicted before Mr. Sergeant Glynn, Recorder, present Mr. Justice Willis, for a highway robbery on Kenneth Mackenzie, Esq., Earl of Seaford. The

(1) 1 Leach, p. 89.

principal witness was one *William Gully*, an accomplice, to whose competency to give evidence Mr. Silvester objected, upon the ground of his being a convict under sentence of death; to prove which, he produced the record of his conviction in December Session, 1772, and a witness to identify his person. Mr. Lucas, Counsel for the prosecution, produced the King's Sign Manual, under which the prisoner had been discharged, on his giving security to appear and plead the next general pardon that should come out. But the Court said the objection was incontrovertible; for nothing less than a pardon under the great seal can restore the competency of a witness, and it was impossible for the Court judicially to take notice of His Majesty's intention to pardon, which is the extent of what the Sign Manual has signified. It was determined in the case of the *Earl of Warwick*, that if a man be convicted of felony that is within clergy, and pray his clergy, and it is allowed; but the burning in the hand is respited, and there is a warrant for his pardon, that he cannot be a witness until it has passed the great seal, and he has produced and pleaded it *sub pade sigilli*, for as it is for his benefit, it is presumed to be in his custody, and it would be error to grant him the benefit of it until it has been allowed; but letters under the King's Sign Manual cannot be pleaded as a pardon. The prisoner was accordingly acquitted." As I have already observed, I merely refer to this case, to show the clear principle upon which the Courts in the mother country proceed, and that had this witness been produced in an English Court, the record of his conviction and judgment upon it proved, and his person identified, that it would be a matter of course to reject him. Is there, then, in this Colony, anything which would warrant such a departure from the law of England, as to sanction the admission of a witness like this? To determine this most delicate and important question, we must look to the spirit of the law of England, and satisfy ourselves whether the rule of law which excludes witnesses, *propter delictum*, be merely a rule *positivi juris*, admitting of a total deviation, without injury to the abstract principles of justice—or, whether it be a rule founded in reason, and only admitting of a deviation, upon grounds of extreme necessity, and not sanctioning a departure any further than such necessity will justify. That I apprehend to be the sole point of determination in this case. In order to determine it, we must touch upon the principle, how far circumstances of necessity will at all admit of a departure from our established principle of law, or whether such departure, if it be admitted, should not be limited down to cases of such extreme and overwhelming necessity, that a total failure of justice must be the consequence of a strict adherence to it. The text law on this subject is thus briefly laid down in

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1831. *Blackstone's Commentaries*: "All witnesses of whatsoever religion or country, that have the use of their reason, are to be received and examined, *except such as are infamous*, or such as are interested in the event of a suit. Infamous persons are such as may be challenged as jurors, *propter delictum*, and therefore *never shall be admitted to give evidence to inform that Jury, with whom they were too scandalous to associate.*" This is the text law, as it is to be found in all writers on the principles of the English law. The grounds and reasons on which it is founded are well expressed by that great lawyer, Lord Chief Baron *Gilbert*, who, in his work on evidence, says:—"Every plain and honest man, affirming the truth of any matter under the sanction of an oath, is entitled to faith and credit; so that, under such attestation, the fact is understood to be fully proved. But when a man is convicted of falsity and other crimes against the common principles of honesty and humanity, his oath is of no weight, because he hath not the credit of a witness, and there is a greater presumption against him, than there can be on his behalf. For the presumption is benign and humane to every man produced as a witness that he will not falsify or prevaricate, in matters of such importance, but where a man is a *notorious and public criminal* this presumption fails him, and from thenceforth he is rather to be intended as a man profligate and abandoned, than one under the sentiments and conviction of those principles which teach probity and veracity; and consequently the producing such a man is ineffectual, *because the credit of his oath is overbalanced by the stain of his iniquity.*" It were unnecessary to multiply authorities: all the writers, from *Bracton* and *Fleta*, down to *Blackstone* and the latest authorities of the present day, will be found to lay down the same principle in the same words. It is coeval with the administration of justice in the English Courts; it is laid in the foundations of the Constitution. It is declared by *Magna Charta*, that no free man shall be interrupted in his person or his property, except by the judgment of his peers or by the law of the land. The same objection which would exclude a tainted juror from the panel, would exclude a tainted witness from the box. The principle is not peculiar to the laws of England: it is to be found throughout the written laws of the Romans, and has been incorporated into the municipal code of every civilized state in Europe. In the *Digest*, under the title "*De testibus*," the following description of persons are excluded from giving testimony by the *Julian law*, *de vi*:—"Qui iudicis publico damnatus erit; qui eorum in integrum restitutus non erit; quive in vinculis custodiave publica erit." I have made these references to the Roman civil law, not as authorities
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for the law itself, but to show the general assent of mankind to the principle upon which it is founded, and to strengthen the conclusion at which I have arrived, that the rule of evidence which excludes infamous witnesses is a fundamental rule of law, founded in universal principles, and therefore not to be departed from except in cases of extreme necessity. Wherever the law has obtained the semblance of science, a rule has been adopted with respect to the admission of witnesses; and if, independently of any other argument, we attentively consider the effect which evidence must necessarily have upon the administration of justice; the reliance that is placed on witnesses; that all judicial decisions depend upon their testimony; that there is not a right of which a man may not be deprived by false swearing; that property, reputation, life itself, depend upon the evidence a witness may give; that the most grievous, fatal, and irremediable mischief may be introduced into the administration of human affairs; that the very sanctuaries of justice, the safeguards of the State, may be perverted to the ruin and extinction of all they were created to protect, we cannot but feel the full force of the reasons for regulating the admission of evidence, and allow that the law which goes to admit or reject the testimony of witnesses is necessarily a fundamental law, and is so interwoven with the whole fabric of justice as never to be departed from, except in cases of overwhelming necessity. The law of England provides in two ways for the elicitation of truth; it excludes infamous persons as witnesses; and it binds such as it admits by the solemn sanction of an oath, fortified by the penal consequences of false swearing. These are the two bulwarks which the law has raised up for the protection of the subject; and I repeat, therefore, that *out of this Colony* this question could not have been raised. The law of England presumes an infamous person to be regardless of an oath;—and what penalties can reach a man under sentence of death? Both obligations, in a case like this, fall to the ground, and the protections of the law become a nullity. Such is the law in England.

I anticipate a powerful argument, drawn from the necessity of the case, that this being a penal Colony, *ex necessitate*, a different rule must prevail here, and that we must admit testimony which would not be admitted in England. Before, however, I proceed to examine the law of necessity, as applied to this case, I will dispose of an argument raised under the provisions of the 9th Geo. IV, c. 83, which is supposed to give the Supreme Court of this Colony a discretion to adopt only so much of the English law as it can apply. Before the passing of this Statute, it was laid down in all the authorities, and confirmed by the ruling of the King in Council, that wherever a new

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Colony is settled by British subjects, the laws of the parent country become the laws of the place, so far as they are, or may be made applicable to its circumstances and condition. The New South Wales Act does not introduce a new principle. It is recognised in the old common law of the Colonies, and is laid down in *Blackstone*, vol. I, p. 107, that, "if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force," with the restrictions therein set forth. The laws of England are declared by the Act for settling the succession to the throne, to be the birthright of the subject. Let an Englishman go where he will, and settle a new country, he carries with him all the laws which are applicable to his condition. What laws do or do not apply, must necessarily be left to the local authorities to determine, always subject to an appeal to the King in Council. Now, this principle is affirmed in the Act referred to, and is carried no farther. There is a wide distinction between not applying a particular rule of law, and creating a new and a different rule—between legislating and expounding. I apprehend, therefore, that the Act of the 9th Geo. IV, is merely declaratory of what the law was before, which directs that so much of the statute and common law shall be as can be applied. With respect to the statute law, an important point has thus been gained. It is laid down by *Blackstone*, that, when a Colony is settled, the statute law, that is, Acts of Parliament passed subsequently, are no longer applicable, unless it be specially named therein; and many cases have been determined upon a decision of the King in Council on this point, so far back as 1761. But the 9th Geo. IV, cap. 83, enacts that the Courts here shall apply all the statutes of England, and also the common law, as the law of the Colony, up to the passing of the Act; and then goes on to direct that, whenever any doubt shall arise as to the applicability to the Colony of any law, the Judges of the Supreme Court shall declare what laws do or do not apply. Now, it is contended, that under this Statute there is a positive recognition of the power of this Court to apply the law only so far as circumstances will admit; and that it may, therefore, dispense with so much of the law of England as relates to the exclusion of witnesses *propter delictum*. That, however, is not the way in which I construe the Act. Where we can apply the law, we are to apply it: the Act is, as I apprehend, merely declaratory; it only places the Court on the same footing in which it stood previous to that enactment, namely, of admitting or rejecting—of declaring what laws do or do not apply—between which and creating a new law I draw a broad line of distinction. The case, therefore, must depend upon necessity; and, as I have

already observed, I am aware that I shall be met by a powerful argument deduced from the character of the Colony and of its population. This certainly is a penal Colony; and when first settled by far the greater portion of its inhabitants were transported offenders convicted in England of what would be considered "infamous crimes." Now, it will be at once seen that such persons, by the law of England, could not be admitted as witnesses, but then there is here a formal mode of getting rid of the rule of evidence which would exclude them in England, in the necessity of producing the record of conviction and the impossibility of producing it. But, I apprehend, a wider ground may be taken, from the necessity of the case, which required that by far the greater portion of the inhabitants of the Colony should not be rejected as witnesses. Here, certainly, was a necessity which warranted a departure from the strict rule of law arising out of the difference between the *actual* situation of such persons here and in England. In England persons so convicted are placed in confinement, or sent into exile, and no longer form members of the community at large; but in New South Wales they are liberated on arrival, and are admitted to certain qualified rights—they are no longer *in vinculis* but the actors or witnesses in nine cases out of ten that come before a Court of Justice. To exclude such persons, therefore, would be to shut out of Court nine-tenths of the witnesses to every ordinary transaction which might become the subject of judicial investigation. These persons, therefore, differing from any other class of persons in England, must be admitted to give evidence here, *ex necessitate*. This view of the subject is also borne out by analogy to the law of England itself. I put the case of a person indicted under the statute of *Henry the Seventh* for forcible abduction and marrying a woman against her will. In such a case the general principle would seem to prevail, the wife is not a competent witness against her husband; but the Court overruled the objection, and from necessity admitted a departure from the law of England [4 *Hawk. P.C.*, 432]. So also in *Lord Audley's* case, which, though objected to as unlawful, still the better opinion appears to be, that in such cases, to uphold the general principle would operate as a denial of justice, as it would be impossible to punish offenders, if the only person who could give evidence in the case were to be excluded. In these cases, therefore, I perceive an analogy to the principle which induced the Courts here to admit transported felons to give evidence, from necessity. But necessity is the exception, not the rule—it is to be construed *strictissimi juris*, and not extended beyond the exigency which requires it. I put it broadly, then, how far does that case bear out the present? Is there any analogy whatever

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between them? This Colony though *penal* as a Colony, is also *penitentiary* as a Colony. It was considered by the Legislature, that by removing the class of persons who are sent out here from the scene of their crimes, and the contagion of their associates, they might be restored to a new course of life and character. They are not like persons enduring a sentence in England; they are, in fact, set at liberty, depending upon their good conduct, to earn a future character and station in society. Such a population differs materially from persons enduring sentence in the Mother Country. Is, then, a person so situated—at large in the Colony—to be regarded in the same light as if the same person should commit fresh crimes of the deepest dye, and receive sentence of death? What was the situation of a witness in this case? Originally a transported felon from the Mother Country, he is not only convicted of a capital offence in this Colony, and receives sentence of death, but also comes into the box a self-convicted accomplice in the very crimes of which he charges the prisoners against whom he is called to give evidence. Is there not a broad and tangible difference between such a case, and that of a transported population from the Mother Country? His accumulated crimes render his testimony valueless—the sanction of an oath of no force—and the punishment of perjury cannot reach him: all the safeguards of the law consequently fail. Is cumulative crime nothing? is attain upon attain nothing? is there no point where the law of the civilized world can come into operation—where the Court must stop? Is the principle of the English law—the law of all moralized states, entirely inapplicable? has it no *locus standi* in this Court? If this witness be competent and his testimony admissible, I cannot discover any tangible, sound distinction between this case and that of a felon brought from the condemned cells, or even the gibbet itself, to give evidence against the free inhabitants of this Colony. If there be, where *is* the distinction? Let it be stated, and I will immediately put a case just short of it, and distinguished only by such thin and impalpable shades of difference, so dependant upon the mere opinion of a judge, that it will be seen the distinction is not founded in any fixed principle, and that the issues of life and death may, and must depend upon what may be termed the *discretion*, but what, in the spirit of the English law, would be the mere *will* of the judge. Between these extreme cases and those of the ordinary prisoners transported to the Colony, there is this clear and palpable difference: the former stand doubly and trebly convicted,—they are deeper stained with infamy by their conviction, they are removed from society by confinement or transportation, they are not the daily witnesses of transactions in

ordinary life,—they are out of the reach of the penal consequences of perjury. The latter, on the other hand, are no longer *in vinculis*,—they are restored *sub modo*, to society, they are engaged on the ordinary business of the Colony, they are upon their good behaviour, and are within the means of punishment if they be guilty of perjury. Beyond the claim of necessity and the practice of the Colony to admit these men to be witnesses, it becomes difficult, if not impossible, to draw any tangible line, or fix any definite rule. If we decide that witnesses like the man, *Blaxstone*, are to be admitted, we at once rule, as a general principle, that the law of England, *propter delictum*, under no circumstances, can be supplied here, and raise up a most frightful responsibility in the bosom of the judges; because I do not know where we are to stop, if it be held that no man can be objected to as a witness, even though he had received sentence of death, and the gibbet waited for him. Upon the principle of necessity, therefore, allowing the necessity in certain cases, I trace a wide and practical difference between admitting the transported population as witnesses, and admitting persons convicted again in this Colony, of capital crimes, and under an unpardoned sentence of death. Then, with regard to the argument respecting the practice of the Court, which is said to have been to admit such persons, as witnesses, I do not think that it can be established. On the contrary, there is no case within my recollection or research, in which the production of the record of conviction for a capital felony and judgment of death, and consequent attainder, has not excluded the witness, excepting only in cases of crimes committed at our penal settlements, where, by analogy to the rule of necessity, as applied to the inhabitants at large in this Colony, the convicts are admitted *ex necessitate*, without reference to their secondary convictions. These are excepted cases—they are, in fact, *sui generis*—standing alone, and depending upon the peculiar character of the settlements in which they occur. In the course of my experience, many cases have arisen in which colonial pardons have been given to restore competency. In the case of the *King* against *Dwyer* and *others*, tried on the 30th of March, 1825, a witness named *Edward Power* was put into the box, and his competency objected to on the ground of his being a convict attaint, the record of his conviction was proved, and his person identified. In answer to the objection, the counsel for the Crown produced the Governor's pardon, on condition of proceeding to a penal settlement; but, in that case, it was held that the pardon being conditional did not restore his competency as a witness, and the prosecution was abandoned. The case was tried before me, and I do not cite it as an authority, but to show that the argument drawn from the practice of

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the Court cannot be sustained. But there was another case which came before the Court almost at the same time and with the one under consideration, I allude to the case of the *King v. Walmsley*,—a case perfectly parallel in principle to this. Walmsley was a convict *attaint* and an accomplice;—an objection was taken to his competency to give evidence, and a pardon was put into his hand. Now, where was the necessity for a pardon in that case, which did not exist in this? Why was *Walmsley* pardoned to restore his competency, and *Blawstone* not? Where is the keeping between the two cases in principle? where in practice? There was a way to restore this man's competency to give testimony—he might have been pardoned. By the law of England, a pardon restores competency as a witness. I am not now called upon to go into the reason of that law, though, doubtless, if it were investigated, the reason would be found sufficient. This witness might have been pardoned, and there was therefore no such overwhelming necessity cast upon the Court, as should induce the Court to depart from the law of the land, and hold that a man *civiliter mortuus*—a thrice convicted felon, twice by the laws of his country, and once by himself—is a competent witness. I would also observe, that this Colony, by an influx of free inhabitants and the gradual emancipation of a large proportion of the original prison population, has considerably changed its character since its first formation; and, although this circumstance is not a reason why we should hold shifting and fluctuating doctrines, still it is a prudent and wise argument why we should not extend its penal character, but assimilate it as far as possible to the mother country; and unless it can be shown that the invariable practice has been to admit such testimony, that now is not the time to extend the principle to cases, to which it has not been extended before. I do not feel myself at liberty to travel out of the point reserved, namely, the competency of the witness to give evidence, by entering into the peculiar circumstances of this case—the nature of the crime, or the credibility of the testimony given by the witness. I object to his *competency* upon what I apprehend to be principles too strong for this Court to get over. It is not legitimate to look at the particular circumstances of this or of any other case. What is the law of evidence in this case to-day, must be that of any other case to-morrow. I am, therefore, compelled to come to the conclusion, that the only legitimate way of restoring this man's competency, was by giving him a pardon, as had been done in the case of *Walmsley*, and not to cast upon the Court the necessity of departing from what I consider a fundamental law of the land, and not a mere canon of evidence, by ruling that all men are competent witnesses, without reference to the infamy of their

lives, or however steeped in crime they may come forth. We do not sit here to legislate, but to administer the law as we find it. If the law require amendment or adaptation, it must be done by the makers of the laws, and not by the expounders of the laws. If a necessity should be supposed to exist here, for departing from a principle which has obtained the universal assent of civilised mankind, the Legislature is the only proper power to remedy the law and adapt it to the exigencies of the Colony. But, sitting here as a Judge, to administer the law, I feel bound, however, I regret to differ from my learned colleagues on the Bench, to state the conclusion at which I have arrived, namely, that the testimony of this man was improperly received, and that I should be departing most unwarrantably from the law of England, if I held him to be a competent witness in this case. I am therefore of opinion that the motion of Counsel should be granted.

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DOWLING J. (1). It is the misfortune of His Honor Mr. *Justice Stephen* and myself, to differ in opinion with His Honor the *Chief Justice* on this occasion. Our regret is the more poignant, considering the serious consequences likely to follow our judgment, as it respects the fate of the prisoners at the bar. Having, however, made up our minds as to the course of duty, which we feel ourselves called upon to pursue, after many days, nay nights, of painful deliberation, we cannot shrink from the discharge of it, disagreeable as it certainly is to us not to defer to the opinion of the able and learned person who occupies the chief seat in this Court. Being thus formed, and acting under the solemn obligation cast upon us by our office, I think it would ill become us to abstain from promulgating our opinion, under a conscientious conviction of its rectitude, notwithstanding its opposition to the view taken of the case by our enlightened colleague. If a silent dissent upon such a subject could, with propriety, be observed, we would gladly have availed ourselves of that course, but considering the strenuous and public manner in which this matter was discussed, we feel ourselves called upon openly to state the grounds of our decision. As it has fallen to my lot to minute down some of the reasons upon which our opinion is formed, I shall, with the concurrence of my venerable and learned brother, and indeed at his request, take precedence of him in expressing our united sentiments; he, however, reserving to himself the right of adding afterwards what he may think I have omitted in further illustration of the subject.

(1) The corrections in this reprint of the judgment of *Dowling J.* are those made by His Honor, and contained in Vol. 56, p. 161 *et seq.* of his general notes.

1831. This case was argued on the 28th June, 1831, with great zeal, ability, and learning. No man called upon to administer the anxious and sacred duties of a Judge, can be indifferent to the advantages resulting from the assistance of an intelligent and independent bar, in the discussion of all matters of doubt or difficulty presented to his consideration and judgment. These advantages the Court has had on the present occasion, and has fully availed itself of them, in applying its mind to the resolution it is called upon to form on the several points submitted for determination.

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The material question arising in the case is, whether a convict attainted of a capital felony, committed within the territory of New South Wales, but whose sentence has been commuted by the Governor to transportation for fourteen years to a penal settlement, can, before the expiration of his commuted punishment, be received as a competent witness in a court of justice within this Colony, without a pardon of the offence of which he has been attainted.

Before I state the grounds of the opinion which I entertain upon this important question, it may be convenient, though perhaps unnecessary, to bring under review—first, the peculiar character of the Colony, and, secondly, the circumstances of the case in which the question arises.

First, it is a matter of history that, until within the last ten years, New South Wales has, with few exceptions, been exclusively dedicated by the Crown to the reception and detention as a place of punishment and reformation of offenders against the laws of the Empire. To all intents and purposes it has been treated and regarded as an extensive gaol, and most, if not all, the laws and regulations for its government have been founded on that footing. In no sense of the word has it been, nor can it have been considered, as a free settlement and colony of Englishmen. In this respect it has been in the lowest grade in which a society of English subjects could be placed to form a community, and differed from every other colony under the dominion of the British Crown. Admitting, on the authority of *Salkeld*, p. 411 and p. 666, and 2 *P. Williams*, 75,—“That if an uninhabited country be discovered and planted by Englishmen, all the laws then in being, which are the birthright of every subject, are immediately there in force,” still, I apprehend this doctrine could not be reasonably construed to extend to a community of English subjects, not voluntarily settling as free emigrants in a newly-discovered country, but brought thither as a place of punishment and exile, in consequence of their having violated those very laws under which they had been previously protected as a

matter of birthright. In such a state of society, I apprehend, the general municipal laws of England could not have been administered, and that no laws could be applied to them but such as are equally applicable to all persons in the like degraded situation, whether confined within the walls of a gaol or allowed to move within certain prescribed bounds under restraints of penal discipline, namely, those that had the effect of protecting them against unlawful violence, or unnecessary coercion.

Any other laws or regulations applicable to them must have reference to their peculiar condition, and to the necessities of the place in which they were inhabiting, arising from the gradual emancipation of individuals from penal restraint. It is very true that within the last ten years the territory of New South Wales has been thrown open for, and encouragement given to, the surplus free population of the mother country, to emigrate to our shores; and it is no less true (and it is a subject of the warmest gratulation) that the general character of this settlement has been progressively ameliorated by the decided reformation of a large proportion of its original inhabitants, but more especially in the almost universal correctness and morality of their progeny; but still New South Wales retains its prominent character as a place of penal transportation. A vast majority of its inhabitants have been or are still subjected to those legal disabilities consequent upon the crimes committed in the mother country. Notwithstanding the auspicious aspect which the settlement has assumed during the period to which I have alluded, it is not to be denied that it has not yet attained that rank which places it on an equal footing in political and municipal government with any other Colony of the British Crown. It continues the receptacle of those criminals who have subjected themselves to the just severities of the law in their native land, hundreds of whom are annually transported to our shores. As a general proposition, therefore, it is not true that the laws of England are, or can be applied universally in this country, laying aside the infancy of the settlement, and adverting solely to the peculiarly anomalous character of its society. If any doubt could be entertained of this, it must be removed at once by a reference to the New South Wales Act, 9 Geo. IV c. 83, almost every provision of which has in view the peculiarity of the Colony since the foundation. Even the 24th section, relied upon so much in argument, demonstrates this; for although it enacts "that all laws *and* statutes" (which I take to comprehend the *common* as well as the statute laws) "in force within the realm of England at the time of the passing of this Act [not being inconsistent herewith, or with any charters or letters patent or order

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 v. WALES,"—yet it is with this limitation, "so far as the same can be
 FARRELL. applied within the Colony," which is a clear recognition of the isolated
 Dowling J. character of the Colony when contrasted with any British settle-
 ment. It is very true that it is enacted by the same clause, that
 as often as any case shall arise as to the application of any such
 laws in the Colony, the Governor, with the advice of the Legislative
 Council, shall by ordinances declare whether such laws shall be deemed
 to extend to the Colony, &c., but still it is the duty in the meantime
 and before such ordinances are passed, of the Supreme Court, as often
 as any such doubts shall arise upon the trial of any information or
 action, to adjudge and decide as to the application of any such laws in
 the Colony. This however clearly applies to the common law as well
 as the statute laws of England, as may be collected from the very first
 paragraph of the clause which speaks of "*all laws and statutes*" in
 force within the realm of England. It therefore gives us in express
 terms the power, nay, it imposes on us the duty of determining the
 applicability of any of the laws of England, whether common or
 statutable to this Colony.

In endeavouring to apply even some of the fundamental principles
 of the common law of England, the Judges of this Court have con-
 stantly found themselves obstructed by local difficulties and peculiarities,
 arising from the character of the inhabitants and the relations pro-
 duced in the intercourse of a society so compounded. They have
 been compelled to lay down principles, and adopt resolutions, which
 would perhaps startle a lawyer in Westminster Hall, but which they
 have been driven to resort to in order to meet the exigencies of
 society, and adopt the principles of British law as far as they were
 practicable, consistently with the heterogenous state of the community.
 A very anxious and responsible duty has thus been cast upon the
 Judges of this Court. They could have been well pleased, if it were
 practicable by legislative authority, to declare beforehand what rules
 and maxims of the common law of England were, and what were not,
 applicable to the territory of New South Wales; but as such a legis-
 lative declaration might be productive of the greatest inconvenience
 the Legislature has been pleased to leave a wide discretion to the
 Judges, to mould the principles and rules of the common law, to the
 actual state of society, to which the jurisdiction of this Court extends.
 The utmost that the Legislature could have done would have been
 to provide as many rules and regulations as would embrace the
 greater number of cases likely to occur, and then trust, after

all, to the authority of the Judges, acting upon the spirit of the law, for the settlement of such as could not be decided according to its letter. In this country an infinite number of questions have arisen, and are still likely to arise, from the practical application of the general principles of English law, to the varied and incongruous transactions of human life. A very responsible power, certainly, is vested in the Judges in this respect, but the Legislature having reposed it in us, I confidently trust that those who are called upon to exercise it will do so soundly, considerately, and with a conscientious desire honestly and uprightly to acquit themselves of the sacred trust thus confided. I have made these general observations as to the peculiarity of this Colony, for the purpose of pointing out how evidently it differs not only from the transcendent condition of the parent state, but from every other British settlement in parts beyond seas, and to note how difficult, nay, impracticable, it is to act upon every maxim of British law with the same strictness, consistency, and inviolability that is observable in the mother country and its other dependencies. The canons of evidence, as part of the common law of England, for the like reasons to which I have alluded, are no less subject to modifications and departures in the practical administration of justice in our Courts than are the principles and maxims of the general unwritten laws of the Empire. This branch of the common law is founded rather upon the local usages and Rules of Practice of the Courts, and the *dicta* of Judges delivered from time to time in the practical administration of justice, than upon general settled customs and usages, which have become fixed in the minds and consciences of all men as the result of a right sense and perception of natural justice, which is the foundation of what is emphatically called common law. These Rules of Practice have, even in the Courts of the mother country, varied from time to time according to circumstances, and are perpetually subject to changes, like all judicial resolutions, according to exigencies not originally foreseen. In forming such resolutions, the Judges cannot reasonably be said to assume to themselves the power of legislation in the latitude which was urged in the course of the argument in this case. The Rules of Evidence which the Judges are compelled to resort to in the practical execution of the laws, are only the means by which the laws themselves are carried into effect. In one sense they may be said to legislate, for not only every rule which they lay down, but every judgment or decision of the Court may be said to be a law as far as it goes; that is, a precedent for the decision and illustration of every subsequent analogous case that may be brought under consideration. In no other sense does a court of justice legislate or depart from its province in

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this respect ; and I persuade myself that the Judges of this Court will never presume to arrogate to themselves the constitutional province of the Legislature. For my own part I utterly disclaim and repudiate such an idea. I confine myself, and hope ever shall do, to the bounds prescribed by the wisdom of the Legislature for the guidance and government of my conduct in the administration of those laws committed to this Court for execution. The power of prescribing Rules of Practice is incident to every Court of Record. This power is expressly given to this Court by the Statute, Geo. 4, c. 83, s. 16, which authorizes the Judges to make rules and regulations, touching the practice of the Court, and all other matters and things whatsoever for the conduct of business in the Court as may be adapted to the circumstances and conditions of the Colony. But independent of this power, which contemplates written rules and orders, I apprehend that the Court, as a consequence of their jurisdiction as a Supreme Court of Record, would, of necessity, have the power of determining what rules of evidence adopted in the Courts of the Mother Country are applicable in the practical administration of justice, in a community so dissimilar in its elements from the free and untainted country, from which this settlement derives its origin. Having thus premised these few observations as to the peculiar character of this country, I shall now shortly advert to the circumstances of the case in which we are called upon to determine the principal question submitted to our decision.

In the month of September, 1823, a deep laid scheme was formed by more than one person to plunder the Bank of Australia. The plan was executed with a degree of cunning, contrivance, and perseverance, scarcely paralleled in the history of human villainy. After entering a main sewer the depredators burrowed under ground, and made their way through walls many feet in thickness, and after working several days, at length succeeded in breaking into the coffers of the Bank, from which they carried off upwards of £12,000 in notes and cash. The notes found their way into the hands of many suspected persons, and the Bank from the difficulty of affixing guilt upon the holders paid many of them to a large amount, although conscious that they were stolen. The parties who were the actors in the felony contrived to keep their secret, after every effort by reward and vigilance had been used to bring them to justice, until a disclosure was made a very short time since by a man named *William Blaxstone*, a prisoner of the crown, who since the Bank robbery had been convicted in this Court, and had judgment of death recorded against him for a capital felony, but which judgment

had been commuted by His Excellency the Governor, to fourteen years transportation to the penal settlement at Norfolk Island. This man having been brought back to Sydney as a witness in some transaction arising in the Island (being suspected of having participated in the Bank robbery), at first refused to make any communication on the subject, but at length confessed that he and other persons actually committed the robbery, and amongst other individuals whom he implicated were the prisoners *Farrell* and *Dingle* as principals, and the other prisoner *Woodward* as a receiver of part of the stolen property to the amount of £1,000. Upon his information these persons were apprehended, and on their trial *Blackstone* was produced as a witness, and in several material parts of his evidence he was confirmed by other testimony, of unimpeachable character, and the Jury, after a very long and elaborate trial, which occupied ten hours, found all the prisoners—Guilty.

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Under these circumstances the question arises, whether this man could be received as a competent witness in the Courts of this country without a pardon for his Colonial offences. The objection to his competency is, that judgment of death having been recorded against him he is *civiliter mortuus*, and though possessing natural vitality, he is to be regarded in the eye of the law, as actually dead. This it was urged was the inflexible principle of the common law of England, and invariably acted upon with respect to such persons in the administration of justice in the mother country. The authorities cited were 3 *Black Coms.*, p. 370, where it is said, "Infamous persons are such as may be challenged as Jurors *propter delictum*; and therefore never shall be admitted to give evidence to inform that jury with whom they were too scandalous to associate." This position clearly applies to the disability of an infamous person from sitting on a Jury, not to his competency as a witness. From a Text Book of authority on the law of evidence this passage was cited, "If two or more persons are accomplices, one who is not indicted may be a witness against the others. So he may even after conviction, if judgment has not passed against him; for it is not the conviction, but the judgment that creates the disability." Nay, according to *Hawkins*, P.C.B., 2, c. 46, s. 108, it was urged, that it had been even doubted how far the King's pardon would remove the disability of such a witness. Again, in *Gully's* case (1), a witness who had been convicted of felony was rejected though he produced letters under the King's sign manual upon which a pardon would have passed the Great Seal.

(1) 1 Leach, p. 98.

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There is no doubt that these maxims are in full force and virtue in the Courts of the mother country, and there is as little doubt that all Judges would in England abide by them as inflexible. But the question is, whether we, the Judges of the Supreme Court of New South Wales, sitting under the authority of an Act of Parliament creating a peculiar Court for the administration of justice in a penal Colony 16,000 miles distant for the parent State, can rigidly adhere, and act upon maxims which have grown up in the long course of time, and perhaps have become inveterate in an old and settled country, so remotely different from the country in which we are living. By the express directions of Parliament we are required not to create a new law, but to *adjudge* and *decide* whether this, even if it be a fundamental part of the law of England, is applicable to the state and condition of this Colony. God forbid! that the Judges of this Court should ever manifest a disposition to evade or frustrate any merciful spirit in any part of the criminal code of England—a code which it may be admitted is sufficiently terrific in its denunciations against evil doers. We should approach with dismay the attempt to violate any immutable principle of justice, felt in the heart, and approved by the reason of all mankind; but is the admission of such a man as a witness repugnant to anything but a dry canon of evidence, which peculiarly obtains validity in a country so diametrically opposite in its character, its inhabitants, its institutions, to that in which we are living? It is not disputed, that but for the fact of judgment of death being recorded against this man, though pronounced guilty by a jury in his country, he would have been a competent witness. The objection, therefore, resolves itself in one more of technicality than substance. The omnipotence of a pardon under the great seal might restore the man to testimonial vitality, but he would still remain the same infamous and worthless villain; his moral turpitude and baseness, his incredibility as an unconfirmed accomplice would not be thereby purged. Circumstanced therefore as we are, surrounded by a population unhappily too prone, in many instances, from early predilections, to the commission of enormous crimes, and armed as we are with such extensive powers by the wisdom of Parliament, we are imperatively called upon, however repugnant the duty may be to men nurtured in a devout reverence of every principle of British law, to adapt the rules of evidence to the practical administration of justice in this settlement. I feel with full force, and have a just sense of, the danger of admitting the doctrine of expediency and necessity in the administration of the laws; but the welfare of society, the due administration of justice, which is the great bond of the social compact, require in many cases, that this doctrine should be resorted to. Why is it, that, even in the

mother country, informers and accomplices are admitted as competent witnesses in a court of justice? Not that this class of infamous persons are favourites of the law, but that the safety of the State, and the welfare of civilized society require that they should be used as instruments to bring enormous crimes to light. Such persons are received as witnesses *ex necessitate*,—and because without them the greatest offences against society must go unpunished. The Judges in the mother country have confessedly gone to this extent (following, indeed, the principle of the Roman law itself), and no reasonable man, having in view the office and utility of a court of justice, can impugn the soundness of the application of the doctrine of expediency and necessity to this extent. *We* are now called upon to go a step farther, and combat with a canon of evidence which is in its spirit, technical, and goes to disqualify a man, from being a witness, not because he may have been convicted by a jury of his country, of crimes the most abhorrent from human nature, but because he has gone through the form of having judgment of death recorded against him, and has had his life spared through the mercy of the Crown, on condition of being transported to a penal settlement for fourteen years, the term of transportation not being yet expired. I own that regarding it as a naked proposition, my mind is not free from difficulty and anxiety (imbued as it is with the prejudices of an education acquired in Westminster Hall), when called upon to get over even the slightest matter of form where the life of a man is concerned; but constituted as this Court is—called upon as Judges to administer justice in a country so peculiarly circumstanced, we must approach the duty thus cast upon us, and discharge it firmly according to the dictates of our consciences, and a just consideration of the call upon us for the conservation of the lives and property of our fellow-subjects.

In determining this question, my mind has been relieved by the consideration of the long, though perhaps silent usage which has obtained in the Courts in this country upon the subject, and of the seriously inconvenient consequences likely to flow from giving effect to such an objection. If the maxim upon which the objection is founded, be inflexible, and cannot be allowed to yield to expediency or necessity under any circumstances, it would go to disqualify every felon convict transported to this country, whose sentence happened to be unexpired—that is, about three-fourths of the population would be excluded from the witness box, nay put out of the protection of the law against personal violence and oppression. It is admitted, that in practice, such persons are not disqualified, and are every day admitted in the ordinary course of justice, nay, even in cases of life and death. Why are they

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1831. admitted? *Only* because of the difficulty and delay in procuring from the mother country, certified copies of the record of convictions and judgment; this, however, does not get rid of the *principle* of the objection; it is only inconvenience, expediency, and necessity, that *stifle* it, for if the Court could bring itself to tolerate the delay of procuring certified copies of the record of conviction and judgment of every person of this class, the Court would be fettered and hampered by the English canon of evidence in such cases. But after all, is it not a simulation of the understanding, to resort to such a reason for admitting the testimony of such persons? Is it not notorious that these persons have been transported as felon convicts, as appears by the Indents under which they are brought out, treated as such, and submitting as such, in consequence of the record of their conviction and judgment being to be found upon the files of the Court in which they have been tried. The recent case of *Hogan v. Hely*, was decided on this principle, the Court having held that the Indent being equivalent to a warrant of execution, was conclusive, presumptive evidence, until the contrary was proved, of a valid subsisting conviction remaining of record in the Courts of the mother country. Admitting, however, that it were practicable to transmit with every transported felon from the United Kingdom, a certificate copy of the record of his or her conviction and judgment, still, I apprehend, we should, from necessity, be bound in the practical administration of justice, and in the exercise of the powers delegated to us, to resort to a canon of evidence adapted to our own community, and disregard an objection which would be fatal to the competency of such witnesses in the Courts of the mother country. Since the foundation of the Colony, now forty-three years, such persons have been universally admitted as witnesses, notwithstanding the notoriety of their degraded state, and despite the practicability, however inconvenient it might be, of procuring from home official documents to prove their incompetency; but then it is said, that there is a distinction between a person convicted of felony in the Colony, and transported to a penal settlement, and a convicted felon, transported from Great Britain to New South Wales, for, as it was urged, a penal settlement is as to this settlement, what this settlement is to the mother country. I confess, my mind has not been able to understand or grapple with such a distinction. There may be more facility in gaining access to the record of conviction and judgment of a felon in the Colony than in procuring it from England, but is the tenacity of an objection which affects the life of man to be measured by time and place? If the objection be good in the case of a felon convicted in New South Wales, it must be equally

good in the case of a convicted felon transported hither from the mother country. The only difference is, that there would be more difficulty and delay in obtaining the necessary proofs to sustain the objection in the latter, than in the former case. According to the argument, this man stands precisely in the same situation with a capital convict transported to New South Wales from England, under a commutation of his sentence of death; if so, why should this one be rejected and the other admitted as a competent witness? The only reason that can be assigned is, that which I have already pointed out,—merely the delay necessary to procure the copy of the record and judgment against the English convict.

It has been broadly admitted, that with respect to offences committed in the penal dependencies of this Colony, the numerous felons transported thither, though convicted in the Colony, are competent witnesses, because of the necessity of receiving their testimony. It appears to me that this concession goes the whole length of the doctrine upon which the Court is constrained to overrule the objection. Can the difference of place vary a principle, which if, in the abstract, it is sound, legal, and inflexible, must be so everywhere? If such a man as this be a competent witness to give evidence of a transaction arising at a penal settlement, I cannot comprehend why he should not be equally competent in a case occurring in Sydney. Are the lives and personal safety of the unhappy men who may be transported to these penal settlements less the objects of care and solicitude than the lives and personal safety of the rest of God's creatures placed under the dominion of British laws? The life of man is above all price; and surely if the objection be good, and cannot be got over where the life of a freeman is in a jeopardy, it must be equally good in the case of a felon enduring a secondary sentence of transportation—unless, indeed, it be contended that the latter is wholly out of the protection of the law against personal injury, and that arbitrary violence may do as it lists with his life and limbs,—a doctrine which no man, whose mind is imbued with the commonest notions of humanity, can tolerate. It is assumed that all the inhabitants of the penal settlements are transported felons from this part of the Colony—that they stand on an equal footing with each other, and consequently are competent witnesses to prove all crimes there committed. The fact upon which this important concession is made, is, I believe, not true to the extent alleged. It is notorious that there are many unfortunate men in the settlement of Norfolk Island, who have been transported thither direct from England without touching our shores; and it is no less true, that if His Majesty, by the advice of his Privy Council, thinks proper, he is

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empowered by law to direct any number of felon convicts to be transported to that or any other penal settlement. But without alluding to this class of persons, it is within the knowledge of everybody that there is a considerable civil and military establishment there, consisting of a large number of free subjects of the Crown. Cases have frequently arisen, in the different penal settlements in which it has been found necessary to resort to the testimony of persons under what are called secondary sentences, in order to the due investigation of justice. They have been received without objection; and, as far as I know of the history of the Colony, the practice of receiving such witnesses has become inveterate on the principle of necessity. Without appealing to the experience of my learned brethren, I can venture to say, from my own personal knowledge, during the very laborious share of judicial business that has fallen to my lot during the three years that I have been here, that I have tried at least ten capital cases arising in the different settlements, where most of the witnesses, if not all, were transports under unexpired colonial sentences for felony. In these cases it never occurred to anybody even to suggest that such persons were incompetent. The only case in which I personally know the objection to have been raised was in that of *Rex v. Gardener* and *Yema*, tried before His Honor the Chief Justice. There the offence was committed at Port Macquarie, and all the witnesses were capital felons who had been transported to that settlement, and whose commuted sentences were unexpired. The objection was afterwards fully debated and considered, and the whole Court came to the unanimous resolution that their testimony was admissible upon grounds of long usage and necessity. The propriety of that decision has not been impugned. On the contrary, it has been conceded that that case was well decided for the reasons there given; but the distinction which I have already noticed, has been urged, namely, that as that was a case arising at a penal settlement, it cannot govern a case arising at Sydney, more especially on the trial of persons who happen to have become free by the expiration of their original terms of transportation from their native land. Now, whether the persons under trial be free or bondsmen, I apprehend that circumstance cannot affect the *principle* on which the person tendered as a witness is incompetent. If it be absolutely necessary to resort to impure and infamous witnesses in any case in order to bring to light the deepest crimes committed in secrecy, and under the cover of an artful and daring combination, it can make no difference whether the persons accused be free men or still labouring under the disabilities of a subsisting state of penal discipline. The place in which the offence, or the person by whom it is

committed, does not affect the question now under consideration, one way or the other, so long as both are within the jurisdiction of this Court. But even if there were precedents wanting for the admission of such witnesses as these on the trial of free persons, there is a memorable one of very recent date, which must be fresh in the recollection of everybody. On the 9th of October, 1829, a gentleman of military rank, who had been Commandant at Norfolk Island, was tried in this court for alleged wilful murder in that settlement. On that occasion, no less than three transports to that island for capital felonies committed in this part of the Colony, whose commuted sentences were unexpired, were examined as witnesses against the prisoner. The prisoner was ably defended by one of the most intelligent practitioners in this Court, but it never occurred to his quick apprehension to object to the competency of such witnesses. They were received as a matter of course, without any doubt or difficulty. At that time, certainly, the case of *Rex v. Gardiner* and *Yems* had been decided; the judgment of the Court then having been delivered on the 6th of April previously, and probably the reason why the objection was not again taken, was because that decision was considered conclusive, even in a case where the party accused happened to be a free subject of the crown. This I take to be a cogent precedent, if individual cases were wanting, to govern our decision. On Monday, the 11th July instant, an unhappy man named *Macmanus* was executed for cutting and maiming a fellow-prisoner at Moreton Bay. The material witnesses were capital convicts labouring under secondary sentences. There was executed on Monday, the 18th instant, another unhappy man named *Welch*, for a like offence, committed at Norfolk Island, and in his case all the witnesses were fellow prisoners, suffering under commuted sentences of transportation for capital felonies in this Colony. From my own judicial knowledge, I could name, if it were necessary, several other cases of the like kind.

But then it was suggested that there was a course open for making this man a competent witness, namely, that of obtaining for him the Governor's pardon, if his testimony was essential to the ends of justice, and consequently, that it would be carrying the doctrine of necessity farther than this case required. For more abundant caution such a course might certainly have been adopted; but I apprehend it was unnecessary. If the Governor's pardon was necessary in his case, it must be equally necessary in all other cases in which the testimony of such a person is required for the purposes of justice. The penal settlements are the receptacles for the worst criminals—men who have been over and over again convicted of offences against the laws of the

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land, and are in general utterly irreclaimable. Many atrocious crimes are committed amongst them. Will it be contended that such individuals of this class of persons who happen to be present at, or know something of, the murder of one of their fellow-prisoners, committed perhaps by a free man, and consequently become material and necessary witnesses, for the defence as well as for the crown, and without whose testimony justice cannot be duly administered, must receive a pardon of their Colonial offences in order to render them competent, and this without any meritorious reason on their part? Must the worst of men be again turned loose upon that society, of which their crimes have rendered them unworthy members, merely because their testimony happens to become necessary in the due administration of justice? It is a melancholy feature in the history of such settlements, that the degraded inhabitants often hatch or get up crimes solely for the purpose of a short trip to Sydney, and be thus relieved for a time from the dismal irksomeness of penal discipline. Cases of this description have been frequently brought before this Court. From my own judicial knowledge I can certify that when in the box as witnesses some of those men have unsaid that which they were known to have sworn to before the local authorities, and upon the supposed credibility of which they have been transmitted to Sydney at an enormous expense to the crown. If it were essential to their competency, that they should be pardoned (and I see no reason why they should not, if the canon of evidence relied upon be inflexible) where would there be an end of the frauds committed on the mercy of the crown? Such a doctrine would be holding out a tempting bounty to these desperate men to incite to the commission of the most flagrant crimes, in order thereby to obtain a pardon as a price of their becoming witnesses. But supposing it were practicable, and the interests of justice required that such an extraordinary course of proceeding should be adopted, what guarantee would there be that men so long indifferent to the dictates of honesty, morality, and the commonest ties of society, would become the witnesses of truth, or regard the solemn sanctity of an oath? But the mischief of this doctrine would not be confined in its effects to penal settlements. There are hundreds of crown prisoners annually convicted of felonies before this Court—the Quarter Sessions—and before the summary jurisdiction of the Colony, who are set to work in irons on the public roads. These men often become material and necessary witnesses, whilst suffering their secondary punishments, and therefore, if the canon of evidence alluded to be rigidly acted upon in this Colony, as part of the common law of England, these persons must all be pardoned to restore their competency, notwithstanding their personal

unworthiness and moral turpitude. The ordinary stream of justice must be stopped before every tribunal in the Colony, innumerable crimes must go unpunished, and desperate men may set the laws of the country at defiance, unless the competency of such witnesses be restored by pardon. If a pardon to such men could purge them of their moral baseness, restore them to a just sense of their duty as good citizens, and render them worthy members of society, there would be a meritorious consideration for such an interposition of the Royal clemency; but when it is obvious that they would still retain the same habits of worthless depravity, and the like disregard, as before, of the restraints of civilized life, the reason of granting such a boon could be founded only upon deference to a mere matter of form. It may be that in other instances, pardons have been given to restore competency, but this may have been from prudential reasons,—from merit in the persons receiving the pardon, or for other causes to which I am at present a stranger. In the case of *Rex v. Dwyer*, tried before His Honor the Chief Justice in 1824, and mainly relied upon in argument, the principal reason why the convict *Power* was rejected, was that the pardon granted him by the Crown being conditional, and the condition not performed, it was considered insufficient to restore competency. The point now under consideration, though suggested, was not the subject of solemn deliberation and judgment. At that time the Supreme Court had not its present *numerical* strength, at least, and though I will yield to no man in unfeigned admiration of the distinguished talents, great learning, and perspicacious mind of my honored and venerated colleague next to me, yet I persuade myself, that if that case had been presented to his consideration, in the way in which this case has been submitted to us, he would, at least, have pronounced a solemn judgment upon the point, in order that if any doubt existed of the applicability of the canon of evidence relied upon to this Colony, the legislature might have interposed to remove it, and have spared us the painful duty, after the lapse of seven years, of differing with him, upon a point of such vital importance to the administration of justice in this Colony. I grant that there may be extreme cases to which it would be too shocking to carry the doctrine on which our decision must be founded. For instance, in the case of a convict actually doomed to death, and taken to the place of execution; it could not be tolerated that such a man might be brought from the foot of the gibbet, and placed in the witness box to give evidence. This man's recorded judgment of death has been commuted to transportation for a limited time. He stands precisely on the same footing with a convict felon, transported from England to New South Wales. Against him the door of hope is

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1831. not closed. He has still some motives for living, and he may yet be
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 FARRELL. It was asked in the course of the argument why then was it thought
 Dowling J. necessary to grant a pardon to *Walmsley*, a witness on the recent trials
 of the last session, in order to restore his competency? That, certainly,
 was an extreme case, and falling under the class to which I have alluded.
 He had been convicted of two capital felonies, sentence of death had
 been passed upon him, the warrant for his execution signed, and day
 fixed for carrying the dreadful penalty of the law into effect. On the
 very morning when it was expected he should be launched into eternity,
 he was reprieved by His Excellency the Governor, in consequence of
 some disclosures which he had made respecting a long catalogue of
 atrocious crimes, in which he, and other persons were concerned. The
 extremity of this man's case may have been suggested to the Executive
 Authority the seemliness and propriety of granting him a pardon, in
 order to cure any objection to him as a witness, in consequence of the
 late perilous state in which he had been placed. This, it may be said,
 is a very arbitrary distinction, depending entirely upon the discretion
 of the Judge; for that, if the principle is good in any case, it must be
 so in all cases where judgment of death is recorded, no matter whether
 the sentence is to be carried into effect, or commuted to a minor
 punishment. I apprehend it is no more arbitrary than any other dis-
 cretionary power vested by law in a Judge, which is to be exercised
 soundly and considerately with reference to the circumstances of the
 case. There are many rules rigidly right, which it would violate the
 dictates of nature, and offend the honest prejudices of mankind to
 enforce. Cases may arise and *do* often arise in practice, where a court
 of justice is induced upon these considerations to depart from the rigid
 rule. A parent may be called as a witness against a child, and *vice versa*,
 but in cases of life and death, it is with the most painful reluctance
 that such evidence is ever resorted to, and never if it can possibly be
 avoided; and this upon the principle to which I have adverted.

Another argument was pressed upon us, which if it is of any validity
 seems to me to tell rather in favour than against the reasonableness of
 the rule of evidence which we feel ourselves, with some embarrassment,
 compelled to lay down. It is said, that if we receive such a man as this
 as a competent witness, we shall degrade the character of the Colony.
 I venture, however, with some confidence, to hope that no dictum of this
 Court, which is not opposed to right reason, or to the immutable principles
 of truth and justice, will have the effect of either degrading or exalting
 the character of this part of the King's dominions. The resolution which

we are compelled to form, in holding that a canon of evidence in force in the English Courts, does not apply in New South Wales, results from a painful consideration of the exclusive character of the Colony itself; and I rather persuade myself that the good sense of the community in which we live, will go along with us in the reasonableness and justice of our determination, even if it were opposed to our legal powers of adjudication. By this resolution another safeguard will be thrown around the property and the lives of all well-disposed members of society. Guilty and desperate men, engaging with others in nefarious crimes, will be taught that the mouths of their infamous companions will not be closed against them by an objection in its form technical, and that the arm of justice is long and strong enough to reach them, through means not repugnant to the dictates of common sense, or opposed to the spirit of British law.

It may be that a case precisely like this, in the circumstance that this man was an accomplice in the very crime, with which he was called, as a witness, to fix other persons, has never risen before. This distinction cannot in my judgment, affect the principle of the objection; for it must, if sound and not to be invaded as an essential maxim of the common law of England, be equally applicable in all cases where the witness is a convicted felon, whether convicted at home or in the Colony. Difficulties like these must, I apprehend, have been foreseen by the Legislature at the time of erecting this Court for the administration of justice, in a country where such an objection might every hour be raised to the competency of three-fourths of its population; and this omission to legislate upon such a vital subject, reasonably implies that the Legislature intended to leave the rules necessary to the execution of the laws, to the judgment and determination of the judges in the practical administration of justice.

I cannot conceive any real evil likely to arise from resorting to this resolution. This man was tendered as an accomplice in the very crime with which the prisoners were charged. He was notoriously an infamous and worthless wretch. His moral degradation could not be much enhanced by the fact of his having judgment of death recorded against him, after his confession of being concerned in the villainy of the transaction alluded to. As an accomplice the Jury were called upon to deal with him in like manner as all other accomplices, namely, to disbelieve him altogether, and treat him as no witness at all, unless he were satisfactorily confirmed in some material part or parts of his story by unimpeachable testimony. Never, in the course of my experience, did I see such a witness comport himself with so much consistency,

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1831. accuracy, and credibility ; for six or seven hours he was in the witness-box, and stood the brunt of three successive most acute cross-examinations by the prisoners' respective Counsel ; he was unshaken in any part of his statement. In several material circumstances mentioned by him he was confirmed by unquestionable testimony,—and the Jury drew such a conclusion from the evidence as every unprejudiced man who heard the trial must equally have formed. Great confidence must be reposed in the discretion and discernment of Juries when called upon to deal with the testimony of such a witness, and I doubt not that whether the present jury system shall continue, or be succeeded by another more analogous to that of the mother country in criminal cases, the administration of justice may be safely committed to their hands in the province of weighing human testimony and determining upon the guilt or innocence of their fellow creatures.

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Great stress was laid on the wording of the 24th section 9 *Geo. IV, cap. 83*, and particular weight was attached to the words “so far as the same (the laws and statutes of England) *can* be applied within the said Colonies.” Now, reading the word *can*, as importing what is *possible to be done*, still we would be driven to the consideration of all the circumstances under which the power of administering the laws of England is to be exercised. We *can*, and it is *possible* for us, to enforce this very objection against every transported felon from Great Britain to New South Wales, tendered as a witness, by only postponing the trial in every case until a copy of his conviction and judgment can be obtained from home ; but would this be acting upon the spirit of the statute under which we are sitting ? I apprehend it would not. Other cases might be put in which the power of extending the common law of England might *possibly* be exercised, which it is unnecessary now to mention, but which would in practice operate as a denial of justice in many cases, and utterly defeat the end and object of the Legislature in framing a statute for the peculiar government and municipal regulation of this distant settlement.

After an anxious review of the whole of this case, it appears to me that we cannot, in the discharge of our public duty, but come to the conclusion that this man was a competent witness. Such a resolution, I repeat, is but a Rule of Practice of our Court formed in keeping with the authority given us by Parliament—flowing out of the necessities and contingencies arising in the due administration of justice in this peculiar settlement. I have shown that it is not opposed to the spirit of British law, though it may be to a rigid, even a fundamental Rule of Practice in the mother country, that it is conformable

to the long-settled usages of the Colony itself since its foundation,—that it is not repugnant to common sense, right reason, and humanity,—that it is agreeable to numerous precedents,—that it is in keeping with the interests of civilized society, in protecting it against the grievous outrages of lawless men, committing crimes in secret, and by artful combination violating the rights of property and invading the peaceful dwellings of well-disposed citizens,—and, lastly, I have shown that by the authority of Parliament we are directed to adjudge and decide as to the application of the common law of England to the circumstances and condition of the Colony. Assuming that there were any overwhelming repugnancy in this resolution to the spirit of British law, and that we were obstructed by the wise and constitutional maxim that judges cannot make law, what remedy would there be for the evil? The Legislative Council of this Colony are, by the 22nd section of the New South Wales Act, *sub modo*, restrained from passing laws which are repugnant to the laws of England; but even if they were to pass laws so repugnant, notwithstanding the protest of the judges, they would still be of validity until His Majesty's pleasure should be made known. But I deny that this resolution is repugnant to the spirit of the British law; and I also deny that we are legislating in the sense attributed to this proceeding in the course of argument. We are performing a public duty imperative on us by the great Legislative Council of the Empire itself. The courts of the mother country admit as a matter of mere practice, the testimony of infamous and worthless men in consequence of the absolute necessity of resorting to their evidence for the welfare of society in the detection of enormous crimes. Spies, informers, and accomplices are there used as mechanical instruments to set the law itself in motion. It is true they have hitherto stopped short in the case of a man against whom judgment of death may have been recorded. But a state of society may possibly, though not probably, arise even in England, which may induce the Judges, for reasons of expediency and necessity, to retrace their steps and remodel a Rule of Evidence which is but the creature of the Courts, and not depending upon any enactment of the Legislature. The extraordinary and peculiar state of this country compels us not only to act in obedience to the law, and determine whether this Rule of Practice, even though it be fundamental, be or be not applicable to this Colony, but to follow up the principle of necessity and expediency, by going a step farther than the venerable Judges of England. We are not originating a principle which is unknown to the common law. We are but following it up, and giving it more force and vigour in asserting the dispensation of justice in cases which would otherwise be beyond

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her reach. As a Rule of Practice, and as part of the machinery by which the stream of justice is kept in a continuous course for the sustentation of the laws themselves, I entertain no doubt that we have authority—that as humble ministers at the altar of justice, we are bound to maintain her sacred rights—nay, that we should stultify ourselves if we hesitated to hold that this man was a competent witness. In latter times, the Judges of England have strongly inclined to evade objections going to the competency of witnesses, on the score of infamy, wisely deeming it the safest course and most consistent with common sense and reason, and more consonant with the interests of justice, to let their testimony go with all its brands of infamy to the Jury, for them to judge of its credibility. On this broad principle all difficulty in my mind is removed. Let the doors of justice be thrown open to all men short of a person in the extreme case to which I have alluded, whom it may be practicable to admit, in order that those who are to execute the laws may have the benefit, as much as it is worth, of any human testimony which may develop truth, and give vigour to the arm of justice.

If after this exposition of the opinion entertained by my brother Stephen and myself, the local Legislature shall deem it expedient to remove all doubts upon the subject by passing an ordinance, be it so, and no time should be lost. I shall, of course, bow with the utmost deference to its wisdom. We, the majority of the Judges of the Supreme Court, are however, but conscientiously discharging our duty in declaring, in pursuance of our general powers as Judges of a Court of Record—first, that this canon of evidence, is matter of practice, adapted to the practical administration of justice in this Colony; and, secondly, regarding it as a fundamental principle of the common law, that from our judicial knowledge of this country, it is not as yet adapted to the state and condition of a Colony, which still retains its original predominating character as a penal settlement of the mother country.

I have thus elaborately, though I fear imperfectly, gone through this subject, not from any doubt or difficulty which I entertained at the trial, for I overruled the objection; but the point having been saved at the earnest entreaty of the prisoner's Counsel, and afterwards sustained with an unusual degree of earnestness, zeal, and learning (which were doubtless exerted from great confidence in its tenability), I have thought it my duty to state at large some of the reasons on which I am of opinion that *William Blaxstone* was a competent witness on the trial of the prisoners.

With respect to the other objections taken in argument, they apply solely to the case of the prisoner *Thomas Woodward*. The opinion of the Judges on these points is unanimous. The first objection is, that there was no proof at the trial that he knew that the notes which he was charged with receiving were, in fact, stolen by the prisoners *Farrell* and *Dingle*. Certainly if that were the charge which he was called up to answer, some proof must have been brought forward to infect him with a knowledge of that fact; but upon looking at the record, no such allegation is contained in the indictment. It charges the prisoners *Farrell* and *Dingle*, the one as the principal felon with stealing, and the other as an accessory before the fact of stealing; and then it goes on to charge *Woodward* with receiving part of the stolen property not with a guilty knowledge that it had been stolen by the prisoners previously named, but with a knowledge generally that the part of the property which he had received was in fact stolen. It first specifies the portion of the property, and describes it as being "part and parcel of the promissory notes, and goods and chattels aforesaid, so as aforesaid feloniously stolen, taken, and carried away"; and then proceeds to charge the receiving and scienter by *Woodward*, "feloniously did receive and have, he the said *Thomas Woodward* then and there well knowing the said promissory notes, and goods and chattels last aforesaid, to have been feloniously stolen, taken, and carried away," against the statute. . There is nothing here to charge the prisoner with a guilty knowledge that the notes had been stolen by *Farrell* and *Dingle* or by any other person by name. It is a general charge that he received the notes, with a guilty knowledge that they had been in fact stolen. If the charge had been that he received the notes, well knowing that they had been stolen "as aforesaid," then those latter words might have tied the prosecutor up to proof of the fact, that he actually knew the persons by whom they had been stolen. But these words are omitted in this part of the indictment. It is a simple allegation that the notes stolen "as aforesaid" he did receive and have, knowing them to have been stolen, but not charging him with a knowledge of the manner in which they had been stolen, or of the person by whom they were stolen. If the indictment contained such allegations they might be utterly incapable of proof. Suppose the indictment charged him with receiving the notes, with a guilty knowledge that they had been stolen "by a person or persons to the Attorney-General unknown," then he must have been acquitted, because the stealers were in fact known. It appears to me that this indictment is well framed, and certainly is agreeable to the precedents used in practice in the Courts at home in like cases. The objection is

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ingenious enough, but I think it is wholly untenable. It is no less an offence within the statute whether the receiver did or did not know by whom the goods were stolen, and if this proof were required it would be impossible, in many cases, to reach a receiver, for it is notorious that stolen property very frequently passes from hand to hand, and it may be that the last receiver is wholly ignorant of the manner in which, and the persons by whom, it is stolen, although his conduct may betoken a guilty knowledge that it has been feloniously stolen by somebody. On these grounds I am clearly of opinion that we cannot give effect to the objection.

The remaining objection is more of a technical nature, but in my opinion it is equally untenable. In one part of the indictment against *Woodward*, the property stolen is described as "promissory notes," of a certain value respectively, and in another they are described as "three hundred pieces of paper of the value of £30." Assuming that as promissory notes they are of no value, because taken from the Banking-house, and consequently, as to the Banking Company, they cannot be said to be "unpaid and unsatisfied," still it is said, that if they are of any value as so many pieces of paper, it was incumbent on the framer of the indictment to describe them as so many pieces of "engraved paper, or printed paper," for *non constat* that as mere bits of paper they are of any value whatever. I apprehend it is for the Jury to determine upon the evidence whether, as pieces of paper simply, they were of any value. Now, it was sworn on the trial that, as mere waste paper, these notes were worth at least one penny, which is quite sufficient to show that they were the subject of larceny. It appears to me, however, that, if they were of any value at all, it was quite unnecessary to describe the sort of paper, or set forth any adjunct of the thing itself. In charging a larcenous taking of a piece of woollen cloth, or a silk handkerchief, it would be rather a novelty if the pleader was required to set forth the colour of the cloth, or the pattern of the handkerchief. It appears to me that there is quite sufficient certainty in describing these notes as so many pieces of paper, value so much, in contradiction to any other matter which may be the subject of a felonious larceny, or felonious receiving.

STEPHEN J., briefly concurred.

Foster moved for permission to appeal to the King in Council.

After consideration the judgment of the Court was delivered by DOWLING J., as follows :—

DOWLING J. The novel application which has been made by the learned counsel who have just addressed us, to suspend the judgment

of the Court until an appeal to the King in Council against our decision has been determined being wholly unsupported by any authority, there is nothing to restrain us from proceeding to pass judgment. But even supposing such an appeal would lie in a case of felony, we must at all events perfect the record of our proceedings by awarding judgment as the law directs in your several cases. Independently of this necessary duty cast upon us, I cannot conceive any advantage which could be derived from such an appeal, even if our decisions could be considered erroneous. All that could be transmitted would be the record of the proceedings, which, if perfect on the face of it, would not disclose the grounds of our decision on the point now brought under judgment. There would be nothing, therefore, upon which the King in Council could adjudicate as an appellate tribunal. It is a long settled rule, that no writ of error lies upon a judgment in cases of felony, but even if it did, a writ of error, at common law, would not operate as a stay of execution. No provision has been made in the New South Wales Act for an appeal to the King in Council in criminal cases. In civil cases, to a certain money amount in dispute, there is a provision for that purpose, and a mode pointed out for transmitting the record and evidence to the appellate jurisdiction. It remains, therefore, for the Court to award such judgment as the peculiar circumstances in which a majority of the Judges are placed, may be satisfactory, rather to propriety than to a strict sense of the duty which we owe to the public justice and the laws of the land. Of your moral guilt of the nefarious crimes of which you have been severally convicted, no reasonable person can entertain a shadow of doubt. After consulting with my learned brethren as to the course now to be pursued, I concur with them in thinking, that out of deference to the dissenting opinion of His Honor the Chief Justice as to the legal competency of *William Blaxstone*, the most considerate step to take is, not to pass sentence of death upon you, *George Farrell* and *James Dingle*, and award execution accordingly, but to order judgment of death to be recorded only. This course is taken, not from any misgivings of the majority of the Judges as to the legality of your conviction, but from a seemly deference to the conscientious doubts entertained by the Chief Justice in a case of life and death. The Judges of this Court have no direct means of consulting with, or referring to the venerable Judges of England upon any legal point of doubt or difficulty, and as it would be too painful to cast upon two out of three judges the onerous responsibility of directing the law to be carried into effect by a forfeiture of life, we have come to the resolution that justice will, under all the circumstances of the case,

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be satisfied in the manner I have mentioned, and therefore this Court doth accordingly award, order, and direct that judgment of death be recorded against you, *George Farrell* and *James Dingle*. Though human life may be spared in this instance for the reasons I have suggested, I trust that some steps will be taken hereafter to prevent the recurrence of an objection so detrimental to the interests of public justice. With respect to you, *Thomas Woodward*, all the Judges unanimously concur in thinking that as your life is not in jeopardy by the objection taken on your behalf in common with your fellow prisoners, the aggravated circumstances of your case, notwithstanding the character given you by a number of most respectable persons, are such as to compel them, in the discharge of their duty to the public, to award the extremest punishment authorised by law in the case of receivers of stolen goods. The Court, therefore, doth order and adjudge, that for the offence for which you have been convicted, you be transported to such penal settlement as His Excellency the Governor shall direct and appoint, for the term of fourteen years.

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Usury Laws—13 *Anne*, c. 15, s. 12, (2)—9 *Geo. IV*, c. 83, sec. 24—4 *Geo. IV*, c. 96—
- *Legal rate of interest—Usage.*

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The usury laws of England do not apply to this Colony, nor (*semble*) is there any legal limit here to the rate of interest. Usage of allowing 8 per cent. on promissory notes followed, *per* the C.J. and Dowling J., *Burton J. dissentiente.*

IN this case, which was an action on a promissory note, a question arose as to what was the legal rate of interest in this Colony—whether, in fact, the usury laws applied here. At the trial, before Mr. Justice Burton, the point was reserved, and subsequently argued before the full Court. The facts and arguments sufficiently appear from the judgments, which were delivered on a later day.

BURTON J. In this case two questions are presented for the consideration of the Court—1st. Whether there be in this Colony any legal limitation to the rate of interest which may be taken for the forbearance of money; and if so, then, 2nd., what is that limitation?

The question arises upon a point reserved on a trial before me and two assessors on the 8th of March last, of an action on a promissory note, upon which Mr. Francis Stephen, the attorney for the plaintiff, asked for a verdict with interest at 8 per cent. from the time the note became due; I directed the assessors to give a verdict for the plaintiff in the amount of the promissory note *with lawful interest thereon*, informing Mr. Stephen that he should move the Court to ascertain what is lawful interest upon such an instrument in this Colony.

On the 6th of April Mr. Francis Stephen moved the Court accordingly; but to be allowed to calculate the interest at the rate of 10 per cent. as being the interest taken by the several Banks, and by usage and custom in this Colony; and it was argued by him and by Mr. Norton, briefly, that the law of England as to the rate of legal interest does not apply to this Colony. And the statute 3 *Geo. IV* c. 47, concerning mortgages executed in Great Britain for securing a greater amount of interest than is legal in England was referred to, which makes legal mortgages, as showing that the colonies are empowered to make their own laws on this subject.

(1) *Sydney Gazette*, June 11, 13, and 15, 1833. (2) 12 *Ann. St.* 2, cap 16, *Ruff.*

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It was further argued that part of an Act may apply and part not; that *the rate of interest is local*, and depends on the *custom of the Colony*, and in this view the statute would then stand a *blank* as to the rate of interest in the Colony, and the Court may yet hold that the Usury Laws apply so far as to restrict the taking more than the rate allowed by custom, but that the *rate of interest does not apply*. And reference was made to the Savings Bank Act (1) which authorises that bank to take not less than 8 per cent. interest, as showing the opinion of the local legislature.

It was argued on the other side by Mr. Keith for the defendant, that 5 per cent. is the lawful interest in this Colony; that the constitution of the Colony and its laws are founded on the statute 9 Geo. IV c. 83; that the Legislative Council might have enacted that 10 per cent. should be legal, or 8 per cent., as by the laws of some West Indian islands, or 6 per cent., as in Canada; but not having done so, he referred to section 24 of that statute, whereby it is enacted that all laws and statutes of England in force at the time of the passing of that Act, shall be applied in the administration of justice, so far as they can be applied, as showing that the law of England on this subject is the law of this Colony, if it can be applied; and the simple question was, can the usury laws of England be applied to this Colony? That as to the rate of interest, that allowed by the statute is the only rate which the Court can allow; that the Savings Bank Act authorising a greater rate of interest in the particular case of that establishment, showed that the legislature did not consider it applicable to all cases. I have approached the consideration of this subject, I will not say reluctantly, because it is my duty, but, under many inducements, arising from the knowledge that my humble opinion is opposed to that of both my brothers—perhaps to that of many members of the legal profession—and certainly to the desires of many persons of great influence in this place, not to approach it at all; but I can suffer neither the one or other of these considerations to move me from the path of duty which my station in this Court, as one of the Judges appointed under the provision of the stat. 9 Geo. 4, c. 83, has imposed upon me. Early upon my arrival in this Colony, I witnessed the uncertainty which prevails upon the subject of the legal interest of money; the looseness of practice at least, if not inadvertance to the true principles upon which it is founded. I saw no particular rate of interest respected or adhered to even in this Court, but that actions were brought, and judgments entered upon instruments

(1) 2 Will. IV No. 13.

bearing various and some exorbitant rates of interest, and without objection. In one case a warrant of attorney appeared which was passed for a debt upon which 25 per cent., and in another a bond upon which 10 per cent. was reserved; in another 15, whilst out of doors 12, and 11½ per cent. were offered by public advertisement for loans of money; and it was proved before me in one case that 45 per cent. had been taken for a discount, and the records of the different registry offices of this Court, although they do not show the whole truth, yet show the most exorbitant and ruinous interest is exacted by the lenders of money. I received no answer to my inquiries which could satisfy me that such a state of things was according to law, and I thought it contrary to my duty to suffer it to continue. If there be no legal limitation to the rate of interest, then what every man contracts for is that which he has a right to claim in a court of law and a court of equity, for that is then *legal interest*. It is only in certain cases, and between particular persons as trustees, and *cestui que* trust, executor, and next of kin, and the like, that a court of equity upon an account gives *usually* a lower rate than legal interest where none has been stipulated for, and none made out of the fund; but in no case can a court of law—and a court of law in this Colony is by the statutes now in force, and by the special provisions of the rules of Court kept as distinct in its functions from the court of equity in this Colony as those courts are in England. It is not competent for a court of law to act upon principles of supposed equity; and it is not the province of the Jury or of assessors in such a court to say what is or what is not a *reasonable rate of interest*, whether there has been a specific agreement for interest or not; but it is the province of the Court alone to determine what is *the legal interest*; that is a question of law expressly left to the Court by the statute under which justice is now administered; and if there be no limitation, the Court is bound by law to give that which is contracted for, if there be, then the Court is bound to give that alone.

It has been stated by the Attorney for the plaintiff in this cause, that the Court itself when the question had been left to its decision (as for the interest due on a mortgage) has uniformly decided not to allow more than 8 per cent., although the mortgage perhaps was given as a security for as much as 20 per cent.

I am however informed by the Registrar of the Courts that he knows of no instance of a bill for foreclosure upon a mortgage being filed; and by the oldest officer of the Court, Mr. Gurner, the chief clerk, I am informed that it is not the practice to take an account of

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1833. interest upon mortgages, unless a bill of foreclosure is filed; and he
 MACDONALD only recollects *two* references on bills of foreclosure during the seventeen
 v. years he has been an officer of the late Supreme Court, and of the present
 LEVY. Court, whilst by a reference to the records in the sheriffs office, I have
 Burton J. found that during the years 1829 and 1830 alone, there were 1,019
 writs executed upon property; how large a proportion of these were
 upon *real property* will appear from a comparison with the number of
 mortgages to which I shall refer. The fact is, that upon every mortgage
 actually executed a warrant of attorney is taken as a collateral security,
 the mortgaged property is taken in execution for the principal with all
 the accumulations of enormous interest, sold by the sheriff, that being
 the most prompt means by which the creditor can obtain satisfaction, as
 it is the most ruinous in the world to the debtor.

As to the argument which has been advanced by the attorney for
 the plaintiff, that before any legislature existed in the Colony, a rate of
 interest of 8 per cent. prevailed by common consent or custom, I must
 observe that to the legality of a custom, there are several requisites in
 which this, if it even existed, are entirely wanting:—First—That it had
 been so long used that the memory of man runneth not to the
 contrary; so that if any one can shew the beginning of it, it is no good
 custom; for which reason no custom can prevail against an *express*
Act of Parliament, since the statute itself is a proof of a time when
 such a custom did not exist. The settlement of this Colony was within
 time of legal memory; the statute of Queen Anne was then in force
 here, and the beginning of the usage (for it cannot be called a custom)
 was, as I shall presently show; on the 14th July, 1804, having had its
 origin in a publication of that date made by Governor King; and the
 first adjudication of interest thereon by the then Court of Civil
 Judicature, appears by the records in the office of the Supreme Court,
 to have been on the 18th August, 1810, in the case of *Jenkins v. Kelly*.
 A custom must also be uniform and consistent and binding upon all,
 and not left to the option of every man, whether he will use it or not.

Immemorial usage is the proper evidence of custom; and if the
 usage be uniform and consistent, it proves it; otherwise, the contrary.
 In the present case, the publication of Governor King, to which I shall
 presently refer, will shew how little uniformity and consistency
 prevailed before the 14th July, 1804. The records of this Court will
 shew how little there has been, either before or since that period; and
 will further shew, that every man has been left to his own option,
 whether he will use it or not. On the 11th April, 1811, in the case of
Loane v. Collins, the Court of Civil Judicature, gave judgment for
 plaintiff, on a bond with interest at 12 per cent.

On the 2nd February, 1813, in *Broughton v. Feen*, the Court gave judgment on a bill of exchange for £550, with interest at 8 per cent., and on the same day in the case of *Riley v. Kable* for 12 per cent. upon two promissory notes.

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In the year 1829, out of 119 cases which judgments have been entered up by writ of the Court and subject to its process of execution, not being the whole number, but taken indifferently out of each terms, there have been cases in which no rate of interest is expressed in the instrument (the interest being probably added to the principal; 75 at 8 per cent.; 13 at 10 per cent.; 29 at 12 per cent.; 1 at 13 per cent.

In the year 1830, out of 122 cases taken in like manner; there have been cases in which no rate of interest is expressed; 86 at 8 per cent.; 2 at 10 per cent.; 31 at 12 per cent.; 2 at 15 per cent. [His Honor here read a statement of the number of warrants of attorney, and a memorandum of mortgages registered between the years 1829 and 1833, on which the rate of interest varied from 5 to 30 per cent.]

I am therefore of opinion, that there is no foundation for the argument advanced by the attorney for the plaintiff, of custom, usage, or common consent. I will next enquire, whether there be any other foundation for this difference between the practice of this colony and the law of England? I found, on examining the records of the former courts of civil judicature, deposited in the Supreme Court, an entry of the 13th August, 1810, to the following effect:—

13th August, 1810.

“Robert Jenkins, Esquire, v. William Kelly.—Action for £100, with interest, at Colonial rate, due for money lent and advanced by plaintiff to defendant. Defendant admitted the same, and that he agreed to pay 8 per cent. interest, from the 2nd December, 1800. By Governor King’s regulation 8 per cent. per annum was allowed as interest. Verdict taken by consent. Damages £105 12s. and costs.”

And on the 22nd January, 1811, an entry to the following effect:—

22nd January, 1811.

“John M’Arthur v. Henry Kable.—Action on a bill of exchange, drawn by defendant, dated Sydney, Port Jackson, 23rd March, 1800, upon Messrs. Plummer, Bashaw, and Plummer, London, directing them, at ninety day’s sight, to pay the sum of £100 sterling to plaintiff, or his order, drawing the bill, presentment for acceptance and payment; and nonpayment and protest admitted. The disputed point was the rate of interest, the Court referring to a Government Order of 14th July, 1804, and to their former judgments, allow 8 per cent. interest.”

A manuscript of the Government Order referred to is still extant at the Colonial Office, with a copy of which I have been furnished; it is as follows:—

“Whereas much litigation and many vexatious suits at law, have repeatedly occurred for want of an established and fixed rate of interest on monies and other

1833. claims within the territory and its dependencies. It is hereby ordained, that no persons do directly or indirectly, for bills, bonds, or contracts, (to be made after the publication of this ordinance) take for the loan or use of money, or any other commodities, above the value of £8 sterling, for the loan or forbearance of £100 sterling or the value thereof for one year, and so proportionately for a greater or less sum ; any custom or usage to the contrary notwithstanding.

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" And if any persons whatsoever do, or shall (after the publication of this ordinance) receive or take more than £8 per cent. per annum, or any bill, bond, or contract as aforesaid, upon conviction thereof, they will be subject to the penalty of the laws of England respecting usury, which is a forfeiture of treble the value, to be appropriated to such public fund or purpose, as the Governor may direct."

1st. It shows how great laxity existed in Court and out of Court at that day, and how little uniformity and consistency of usage.—2nd. That the Governor does not affect to repeal the English law.—3rd. That Governor King had no legislative authority, enabling him to repeal an English Act of Parliament.—4th. That how little it was regarded as a law even prior to the passing of that Act, the records of the then existing Courts have sufficiently shown.—5th. After the passing of the Stat. 9 Geo. IV, c. 83 there can be no pretence for the existence in this Colony of any law contrary to the law of England, not passed by the legislative authority erected in the Colony by virtue either of the Stat. 4 Geo. IV, c. 96, or Stat. 9 Geo. IV, c. 83. As to the argument used by the attorney for the plaintiff, arising from the supposed authority given by the local legislature, to the taking of interest beyond even 8 per cent. as is done in a particular instance in the Savings Bank Act, 2 W. IV, No. 13, sec. 5, and adverting to that clause, I find that it is made lawful for the vice-president or any other trustee attending at such general meeting as is there mentioned, out of the balance in the hands of the treasurer, to discount at a rate of interest *not less than 8 per cent.* per annum ; bills of exchange, or promissory notes of an amount not exceeding £500, &c. The only remarks I will make on this Act are :—1st. That it only applies, and is only intended to apply to the particular case of the Savings' Bank, and cannot be applied to any other.—2nd. That had I been a Judge of this Court at the time it was proposed to the Legislature, I should have found it my duty in pursuance of 22nd sec. of the Statute 9 Geo. IV, c. 83, to transmit to His Excellency the Governor, a representation that the said clause is repugnant to the laws of England. Having thus examined the arguments, which have been adduced to prove that the law of England respecting the interest of money *does not apply* to this Colony, I will now state the reasons which have induced me to form an opinion that it does. It is well known that the first settlement in this Colony took place in the year 1788, and that His Majesty having been empowered by the Statute 24 Geo. III, c. 56,

to appoint some place beyond the sea for the transportation of offenders from Great Britain, and having appointed the eastern coast of New Holland for that purpose, was further empowered by Statute 27 Geo. III, c. 2, to erect a Court of Criminal Judicature for the trial and punishment of offenders, *in a more summary way than was used within the realm according to its known and established laws*, and also that His Majesty did by his letters patent, dated 2nd April, 1787, appoint not only that there should be within this Colony, a Court to be called a Court of Criminal Jurisdiction, but by virtue of His Majesty's Royal Prerogative, it was also appointed that there should be a Court of civil jurisdiction. As to the forms and manner of proceeding in these Courts, they varied from the usual course of Courts in England, but immediately upon their erection, the law to be administered by them (except as altered by the statute) would be the laws of England. For although in the one court its judgments would be chiefly passed perhaps, upon such as had no civil rights remaining to them, having for the most part been attainted felons, yet there were those who accompanied them as guards, or as settlers, and their issue, and the issue of even those attainted felons, whose civil rights were entire, and who might claim to have those rights enforced, except so far as they have been altered by the Act of Parliament. To these the law of England, as far as it was immediately applicable, was their right, and its various provisions from their advancement as a colony and increasing numbers, and increasing transactions with each other, became daily more and more applicable.

I take it to be clear law, without the aid of an Act of Parliament to make it such, that if an uninhabited country (as this at the time of its settlement must be considered to have been, for the wandering tribes of its natives, living without certain habitation and without laws were never in the situation of a conquered people or this colony that of a ceded country), if such a country be discovered and planted by English subjects, all the English laws then in being which are applicable to their situation, and the condition of an infant colony, *are immediately* their birthright, and as their applicability arises from their improving condition, come daily into force. They are not in the situation of persons who go to settle in a conquered country, where laws have pre-existed, and which continue to exist until changed by lawful authority. If they have not the law of England for their guidance, they have none. In this manner the statute of the 13th Anne, c. 15 (1) which was passed in the year 1713 for fixing the rate

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(1) 12 Ann., st. 2, cap. 16, Ruff.

1833. of 5 per cent. in England was a law of this Colony at its first establishment, and was applicable the moment one person became the lender and another a borrower. The precise reason why in certain other colonial possessions of the Crown, which have been referred to for a contrary conclusion, a different rate of interest exists by law, is that which causes the statute of Queen Anne to apply to this Colony; it is that those colonies were settled before that statute was passed, and when the rate of interest was regulated by a previous statute, allowing a greater rate of interest, and that those colonies possessed legislative bodies of their own before the statute of Queen Anne was passed; and after that period laws passed in England do not bind these colonies unless they are specially named. The history of Ireland affords an illustration of this principle. Ireland having been conquered by King Henry II, King John, in the 12th year of his reign, ordained that Ireland should be governed by the laws of England, but, as it still remained a distinct dominion, and had parliaments of its own, no Acts of Parliament since the 12th year of King John's reign extended to that kingdom, unless it was specially named or included under the general words, as "within any of the King's dominions," and by another law called Poyning's Law (1), passed in the 10th Henry VII, it was enacted, that all Acts of Parliament before made in England should be in force in Ireland. By the same rule that the laws passed between the 12th of King John, and 10th Henry VII, were not binding in Ireland, those passed subsequently to the 10th Henry VII, and consequently all Usury Laws, beginning with the 37th Henry VIII (2)—Ireland not being expressly mentioned in them, or included under general words—are not in force there, and the rate of interest in Ireland is different from that in England, being 6 per cent.

Referring to the history of the Colonial Possessions of the Crown, in which a different rate of interest prevails, it will be found to exist upon the same rule. Thus Jamaica was captured in the time of the Commonwealth in 1655, and continued under Military Government until the time of the restoration of King Charles the Second, who on the 13th February, 1661, granted a free constitution to the colonists, including the power of making their own laws, which is the reason that the statute of 12th Charles II c. 13, by which the English rate of interest was fixed at 6 per cent., but not that of 13th Anne, by which it was fixed at 5, applied to the island; and by an Act of the local

(1) 10 Hen. VII. c. 23, Irish stat.

(2) Cap. 9.

Legislature of Jamaica, 33 Charles II, c. 19, the rate of interest was fixed at 10 per cent., and was subsequently reduced by the same authority to 6 per cent. The island of Barbadoes was settled by letters patent, and a power was given to the colonists to make laws on the 2nd June, 1627, which affords a reason why the statutes of Charles II and of Queen Anne, subsequently passed, did not apply to that island, but the statute of 21 James I c. 17, by which legal interest was limited to 8 per cent. In the ceded colonies, as Trinidad, Berbice, Demerara, St. Lucia, the Cape of Good Hope, and Mauritius, a different rate of interest prevails because those countries, at the time of their cession, possessed laws which continued until changed by the Imperial Parliament, or the authority of His Majesty. It was because that in the various possessions of the British Crown (but especially Ireland and the West Indies), a rate of interest legally existed different from that which in the year 1774, came to exist in England, that the statute 14 Geo. III c. 79, explained by 1 and 2 Geo. IV, c. 51, was passed to enable securities by way of mortgages to be executed in England upon property situate in those countries, *provided the rate of interest should not exceed 6 per cent.*; most of the local legislatures of those colonies having at that period reduced, or in consequence of that statute they did afterwards reduce their local interest to that rate; but this statute by no means warrants the argument which was raised upon it by the plaintiff's attorney, *that it authorises the existence of a rate of interest in this colony different from that in England*; no different rate of interest having ever existed here previously to the settlement of the colony by British subjects; and where the law of England on this subject did not then apply there was no law. The only principle upon which the criminal laws of England, as to the definition and punishment of offences comprised in the statutes, as well of the same reign as the statute of Queen Anne, as of many reigns prior and subsequent to that statute, but passed previous to the establishment of the colony, could be administered here upon its first settlement, or any other English law, upon which there never was a doubt, is precisely the same upon which the statute 12th Anne became the law of this colony; and there is no reason for the one of those statutes being law which is not equally applicable to the statute of 12th Anne. The letters patent of His Majesty King George III, dated 2nd April 27th year of His Majesty's reign, first establishing a court of civil judicature in this Colony, prescribes indeed a *form* proceeding, which it was His Majesty's prerogative to do; but as to the laws to be administered, ordains, directs, and authorises the said Court to give judgment and sentence according to the justice and right; which it is remarkable, as

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His Majesty did not affect to prescribe in any other terms what laws should be administered; it was not in His Royal Prerogative to change the laws, but only in the power of the Parliament. The letters patent of His Majesty, dated the 4th February, 1814, repealed the former letters patent, and erected three courts of civil judicature, viz., the Governor's Court, and the Supreme Court, for this Colony, and the Lieutenant-Governor's Court for Van Dieman's Land. The first is directed and authorised "to give judgment and sentence according to justice and right"; the second "to give judgment and sentence according to law and *equity*"; and the third, which was for Van Dieman's Land, in the terms of the Governor's Court, "to give judgment and sentence according to justice and right." It appears by the Report of the Commissioner of Inquiry, on the judicial establishments of this colony, ordered by the House of Commons to be printed on the 21st February, 1823, that a difficulty had been expressed by Mr. Judge Advocate *Wylde* as to the applicability here of English statutes passed in England since the 27 Geo. III. By the statute 4 Geo. IV, c. 96, the constitution of the several courts was changed, but the duty to administer the laws of England, in all matters coming before them, is plainly expressed in almost every clause; and by section 24 His Majesty was empowered to erect a legislative body in the Colony, to make laws and ordinances so as they should not be *repugnant to the law of England, but consistent with such law, as far as the circumstances of the said Colony will admit*. But the 9 Geo. IV, c. 83, further alterations were made in the constitution of the courts of the Colony, but as if to put an end to the difficulties which had been felt as to the application of the laws passed in England since the establishment of the colony; and as if to put an end to all the irregularities which, for want of a legislative body pre-existing in the colony, had crept into practice; as if to put an end also to every *supposed usage* contrary to the law of England which had crept into practice, the Commissioner referring in his Report, which was before Parliament, to *many such*, by that statute, section 24, "It is enacted, that all laws and statutes in force within the realm of England, at the time of the passing of that Act, not being inconsistent therewith, or with any charter or letters patent, or order in Council, which may be issued in pursuance thereof, shall be applied in the administration of justice in the courts of New South Wales and Van Dieman's Land respectively, so far as the same can be applied within the said colonies.

I look upon this clause as the great charter of the Colony, and at once yielding to the colonists all that by the common law, or by the liberal, and enlightened, and accumulated wisdom of our ancestors, has been provided for the protection of life, liberty and property, and for regulating the transactions of men with each other. All becomes by virtue of it "the justice and right" which the judges are sworn to do to all the Kings' subjects, and which is expressly provided in one of the clauses of Magna Charta (itself under this provision the law of the Colony) shall never be denied or delayed. "*Nulli negabimus aut differemus rectum vel justitiam.*" My construction of the 24th clause is, that only one point is left by it to the determination of the Court, viz., *can* the law which a party insists upon be applied in this Colony or not? Does there exist any legal bar to its being applied? If it can be applied, if there be no legal bar, it is his right, and ought to be enforced. There is no expression, as there might have been if such were the intention of the legislature, authorising the judges to apply the laws of England or not, as they may judge them to be convenient or expedient in the particular condition of the country at any particular time, there is no power given them to dispense with any law of England which *can* be applied. To judge of the expediency or convenience of any law is immediately afterwards in the same clause confided to a different and more proper authority in the following words:—

As often as any doubt shall arise as to the application of any such laws or statutes in the said Colonies respectively, it shall be lawful for the Governors of the said Colonies respectively, by and with the advice of the Legislative Councils of the said Colonies respectively, by ordinances to be by them for that purpose made, to declare whether such laws or statutes shall be deemed to extend to such Colonies and to be in force within the same, or to make and establish such limitations and modifications of any such laws and statutes within the said Colonies respectively, as may be deemed expedient in that behalf.

The power of the Judges is only "to adjudge and decide as to the application" (*i.e.*, whether they *can* be applied) "of any such laws or statutes in the said Colonies" and not to make and establish any limitations or modifications therein. The view which I take of my duty as a judge deciding upon any law, is that I am bound to decide "*according to law*" and this, whether in the particular point it may be favourable to the subject, or restrictive, or may only concern private transactions; I have no power to bend the law; transactions in society must be adapted to the law; it is not in Judges, but in Legislatures to adapt the law to the state of society; the law is a main pillar of the Constitution, not to be removed, or bent, or deformed, according to the particular views of judges, but only by the authority of Parliament. With me, therefore, arguments of expediency have no avail; if an

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expedient be necessary, a remedy is necessary, and that only lies with the Legislature, and I have always thought that there has been too great a proneness in Courts to resort to the use of expedients to prevent the execution of what they may consider a hard law, which has grown up to be an evil. For a suitor who has law on his side has been sent out of Court with a loss, because, in the judge's consideration, or that of a jury, perhaps the law is a hard one. A new code becomes established not to found recorded amongst the common or statute law, resting only in the breasts of Judges, varying as they vary, and frequently varying as one and the same person varies with his views and opinions. A code which none knows how to obey, which is made *ex post facto*, and only serves as a trap for litigation, and as a reproach upon the uncertainty of the law. Whereas if the law were to be administered as it is, its inadequacies, its inconvenience, its hardships, if any, which are concealed and glossed over by expedients would be apparent from being felt, and the legislature would be called upon to provide a remedy. These are the considerations which have led me, not here alone, but elsewhere to refuse to depart from the line of my duty which is "*jus dicere*," and not "*jus facere*." It is a good maxim in one law for the avoiding of uncertainties, "*stare decisis*," but it is a still better "*stare legibus*." If the argument of expediency, however, were legitimate in the present case, I am most clearly of opinion that it is all in favour of the law of England respecting usury being applied, and adhered to, in this Colony. The increasing disorder which has occurred since it was departed from shows this to be the case. The enormous and ruinous change of property which occurred in this Colony in the years 1829 and 1830, and still continue in a less degree, and a reference to the records in the office of the Supreme Court of warrants of attorney and memorials of mortgages which I have already made, justify my own mind, at least my opinion, as applied to this Colony. For these reasons therefore I am of opinion:—First—That there is in this Colony a legal limitation to the rate of interest, which may be taken for the forbearance of money. Secondly—That that limitation is such as is imposed by the law of England, and is £5 per cent. Therefore that the plaintiff should be allowed to enter up judgment for interest at the rate of £5 per cent. and no more."

The CHIEF JUSTICE then delivered his opinion to the following effect:—I regret at all times to entertain any difference of opinion with either of my respected brethren on the Bench; and the more especially in a case of such great importance to this community that it would have been desirable, the law should be removed from all doubt, and declared by the unanimous opinion of the Court. The question is,

whether the usury laws of England apply to this Colony, a question which has never been formally raised in this Court before, nor received, that I am aware, the solemn decision of the Judges. It has, however, been the settled practice at *nisi prius*, by all of the Judges who have hitherto sat on this Bench, to allow interest at the rate of 8 per cent. where 5 per cent. would have been the rate allowed in England; and the practice necessarily involves the conclusion, that we all held the statute of Queen Anne, the Act by which the rate of interest is limited to 5 per cent. in England, not to be in force in this Colony. It shall be my endeavour, on the present occasion, to show that this conclusion was right in principle, that the practice of the Court has been correct, and that the laws of England for regulating the interest of money are not applicable to the condition of this Colony, and therefore not in force. Before I proceed to examine the principle upon which my own judgment has been formed, I must anticipate an argument which is frequently urged upon the Court, and which appears to me to be founded on a misconstruction of the 24th section of the New South Wales Act (9 *Geo. IV*, c. 83). That clause has been read, as if it were an enactment, peculiar in its provisions to this Colony, and introductory of a new principle of Colonial law. It will be found, however, that is neither peculiar, nor new; it is, on the contrary, affirmative of the law, as it stood before, as it is laid down by the oldest text writers on the subject, and confirmed by a long and uninterrupted current of legal authorities. To read this clause rightly, we must look first at the law, as it stood exactly at the time of passing the Act itself, and then at the provisions of the Act itself, and by comparing the one with the other, it will be seen, at once, that all that Parliament had in view was to fix the time at which English laws in general should cease to bind this Colony, and to enable the local Legislature, in cases of doubt, to declare whether any particular statute should apply or not. The oldest authority which I can find extant upon this point, is a determination of the Lords of the Privy Council upon an appeal from Barbadoes, whether the statute of frauds (29 *Charles II*) extended to that island. This decision was referred to by Sir *Joseph Jekyll*, Master of the Rolls, in 1772, and is shortly reported in 2 *P. Wms.* 75, as follows:—"If there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so, wherever they go they carry their laws with them, and, therefore, such new found country is to be governed by the laws of England; though *after* such country *is inhabited* by the English, Acts of Parliament made in England, without naming the foreign populations will not bind them." Taking this to be the text law upon

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1833. the subject—and it is reported to be so laid down by the Lords of the
 MACDONALD Privy Council, who are the Judges in the last resort upon appeal from
 " the plantations, and stand in the same relation to the Colonial Courts
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 Forbes C.J. it will be seen that the point of time when a colony was first inhabited
 is a necessary preliminary to the correct application of the rule, and
 that its point must frequently be vague and uncertain, and hence arose
 the necessity of some legal enactment to fix the point of time with
 more precision. But there occurs another and a more important point.
 Does the subject settling in a new place necessarily carry with him *all*
the laws of his country, whether such laws may be suitable to his
 altered position or not? Sir *William Blackstone* in commenting
 upon the resolution of the Lords of the Council, expounds it in the
 following clear and comprehensive terms :—" But this must be under-
 stood with very many, and very great restrictions, such colonists carry
 with them only so much of the English law *as is applicable to their own*
situation, and the condition of an infant colony, such for instance, as
 the general rules of inheritance, and of protection from personal
 injuries. The artificial distinctions and refinements incident to the
 property of a great and commercial people—the laws of police and
 revenue—the mode of maintenance for the established clergy—and a
 multitude of other provisions *are neither necessary nor convenient for*
them, and therefore not in force. What shall be admitted, and what
 rejected, at what time, and under what restrictions, must, in case of
 dispute, be decided in the first instance by their own provisional judi-
 cature" (*Bl. Com. Vol. I., p. 107*). This passage in the Commentaries
 is considered to be a sound exposition of the law by all the writers on
 Colonial law; and is received as authority in our courts. It is cited
 with approbation by Sir *William Grant*, in a recent case which arose
 upon the extension of the statute of Mortmain (9 *Geo. II, c. 1*)
 to the Island of Grenada, who said, " It is undoubtedly true, that all
 the laws of England *are* not, and cannot possibly be in force in that or
 any other colony (*Attorney-General v. Stewart, 2 Merivale 159*). In
Chalmers Collection of Opinions upon points of jurisprudence con-
 cerning the colonies (*Vol. I, 198-220*) I find the opinions of the most
 eminent lawyers in accordance with the text, as laid by *Blackstone*,
 Sir *Robert Henley* and Mr. *Yorke*, Attorney and Solicitor-General in
 the year 1757, in answer to a question put to them by the Committee
 of the Council for the Plantations, how far the statute for counter-
 feiting foreign coins was in force in *Nova Scotia*, state their opinion as
 follows :—" We are of opinion that the proposition adopted by the
 Judges there, that the inhabitants of the colonies carry with them the

statute laws of the realm, is *not true as a general proposition*, but depends upon *circumstances*, the effect of their charter, usage, and acts of their Legislature; and it would be both inconvenient and dangerous to take it in so large an extent." Sir *Phillip Yorke* and Sir *Clement Wearg* had, in the year 1724, expressed their opinion to the same effect. Upon a similar question referred to them, as to what English laws were to be considered in force in Jamaica, they replied, "Such Acts of Parliament as have been made in England to bind the plantations in general, or Jamaica in particular, and also such parts of the common or statute law of England as have *by long usage and general acquiescence* been received and acted under there, though without any particular law of the country for that purpose, are to be considered in force." Lord *Mansfield*, in delivering the opinion of the Court of King's Bench, in the celebrated case of *Campbell v. Hall*, (1) is reported to have referred to this last opinion of the Crown lawyers in the following words:—"A maxim of constitutional law, declared by two such men in modern times as Sir Phillip Yorke and Sir Clement Wearg, will require some authorities to shake." I might multiply great names in support of the principle I contend for, but those which I have cited will be sufficient to prove the existence of the principle itself, and the certainty with which it has been preserved and applied. From these authorities I collect the true principles upon which the laws of England should be extended to the Colonies, as follows:—1st, Statutes passed *after* the settling of a new colony do not bind such colony unless they are extended to the colonies at large, or such colony in particular; 2nd, of the statutes which were passed before the settling of the new colony, only such extend to it as are suited to the condition of the colony; 3rd, in all cases of doubt, the applicability of any particular statute must be determined, in the first instance, by the local courts. Now, carrying these plain principles with us to the consideration of the 24th section of the New South Wales Act, it will at once appear that they are all embodied in that clause, and that the two other provisions which are added to them were intended to give them more complete effect—viz., by fixing the exact time, after which English Acts of Parliament should no longer bind this colony; and enabling the Legislative Council to remove any doubt as to the applicability of any statute, by *declaring* whether such statute did or did not extend to the colony, or under what limitations or modifications it should extend, reserving it still, as the duty of the Judges, in the meantime, to declare the law. The terms of the Act, the anticipation of doubts which might arise, all clearly show that

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(1) Loft 650, Cowp. 204.

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Parliament never intended to broad-cast, as it were, the whole body of English laws upon this Colony, without reference to its condition or circumstances, or considering whether such laws were applicable or otherwise. Surely something more is required of the Court, some higher obligation of intellectual duty imposed on us, than simply to say whether there be a physical possibility of applying a law or not within the Colony. What, I would ask, is there in the peculiar constitution of this infant Colony which requires a different principle to be observed in the application of the laws of England from that which has been observed in applying the same laws to every other colony? We are all placed in the same relative position, having the same rights and obligations, and the same common dependency upon the parent country. If it were both "inconvenient and dangerous" to extend all the laws of England to the elder colonies, how does it become less so in this? The only legitimate object of all laws, is to provide for the protection and necessary wants of mankind—beyond this, every law is unnecessary; and, in proportion as it is inapplicable, it becomes a useless burthen. Of all evils upon society, I know of none more to be deprecated, than to be governed by unsuitable laws—they interfere with the daily habits and pursuits of mankind; they are opposed to their feelings and opinions, and carry in them all the consequences of oppression. If we, the Judges, are merely to declare whether the laws of England *can* be applied or not, what is there to prevent the application of a "multitude" of provisions as *Blackstone* expresses it, which hitherto no one has dreamed of extending to this Colony—the law of marriage—the laws of titles, with their particular exemptions—the poor laws—the excise laws—the particular rule prohibiting two persons (being in partnership) from underwriting the same policy? I know of no argument against the application of these laws, except that they have never been used in the Colony, and that reason concurs with circumstances, in declaring that they are inapplicable to the condition of an infant establishment. Perhaps it will be urged that there is a want of the necessary machinery to execute such laws, and therefore, they are not in force, but this argument will fail, when it is considered that in some of those I have enumerated, there is machinery enough to admit at least, of a partial application, and in many others, which are in fact administered within the Colony, there is a defect of the necessary machinery, as it exists in England. We have, for example, no Sheriff's or County Court, notwithstanding which, the remedy by replevin is as frequently resorted to in this Colony, as if such a court were in full operation. I might quote other instances, but they are unnecessary; the distinction

of such laws as do, and such as do not, require the particular machinery created by the statute which creates the law, to carry them into effect, will be found to be neither a safe nor unerring standard. The first, and leading principle should be, whether such laws are applicable in their nature and object, to the state and condition of the colonists. I am fully aware, that in the adoption of this standard, I shall be met by a strong argument, of the inevitable uncertainty which must remain as to what laws may or may not, *a priori*, be held to apply; a difficulty which many vain attempts have been made to remove, and which must continue until the Legislature shall, by some positive code, embody the whole of the common and statute law of England, which it may intend to apply to the Colony; I venture to affirm, in full confidence of the result, that it will be found impossible by any general clause, so to frame any general rule, as to decide, as by a scale, upon the applicability of any English law, or to place the principle upon a better foundation than it rests on at present. In the absence of any positive code, or statutory declaration of the law upon the point under consideration, it appears to me that I am bound to regard it in the same point of view, as if I had been called upon to decide it in any other colony, or, as I think it would have been decided by the King's superior courts in England, if it had arisen incidentally before them. Assuming then the true point of enquiry to be, whether the statute of *Anne*, limiting the legal rate of interest to 5 per cent. per annum, is applicable to the condition and circumstances of this Colony, I shall proceed to examine it, for the sake of order, under two general heads;—first as to the nature and object of the statute itself, and secondly, as to the usage of this Colony, and the analogous practice of the other plantations.

Among the laws enumerated by Sir *William Blackstone* as not applying to the condition of an infant colony, are "the laws of *police* and *revenue*, especially such as are enforced by penalties." This general distinction appears to have been adopted by the Master of the Rolls, in deciding against the application of the statute of *Mortmain* to the island of *Grenada*—"Whether the statute be in force in this island, will, as it seems to me," says he, "depend on this consideration, whether it be a law of local policy, adapted solely to the country in which it was made, on a general regulation of property, equally applicable to any country, in which property is governed by English law. I conceive that the object of the statute of *Mortmain* is wholly political—that it grew out of local circumstances, and was meant to have merely a local operation. The thing to be prevented, was a mischief existing in England, and it was by the *quality* and *extent* of

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1833. the mischief, *as it there existed*, that the propriety of legislative interference upon the subject was to be determined." *Attorney-General v. Stewart* (1). Upon the same general ground, the Court of King's Bench, in the case of *Rex v. Vaughan* (2), held that the statutes, 12 Ric. II, c. 2, and 5 and 6 Ed. VI, c. 16, against bribery in the sale of offices, did not extend to the island of Jamaica. "These statutes being *positive regulations of police*, not adapted to the circumstances of a new colony, and therefore no part of that law of England, which every colony, *from necessity*, is supposed to carry with them at their plantation." Adopting the distinction here drawn, by the Judges in England, between such laws as are of a general and fundamental kind, upon which the constitutional Government, and social rights of the community depend, and such as are of a political and local nature, calculated to suit the exigencies of particular times and places, and admitting of a deviation without effecting the general laws of the Empire, and applying this distinction to the case under consideration, it appears to me that the laws for regulating the interest of money in England were never intended by the Legislature that made them, to extend beyond the meridian of England; that usury laws are properly laws of police, suited only to local circumstances, varying in their provisions with time and place, and not alike, I believe, at this present moment, in any two of all the numerous possessions of the British Crown. In *England*, in the reign of *Henry VIII*, the rate of interest was regulated at 10 per cent.; in the reign of his successor it was made unlawful to receive any interest at all. A statute of Elizabeth restored the law as it stood under *Henry the Eighth*. In the succeeding reigns of *James* and *Charles the Second*, the legal rate of interest was reduced first to 8, and afterwards to 6 per cent.; and in the 13th year of *Anne* (cap. 15) it was finally reduced to 5 per cent., as it now stands. In *Ireland* the rate of interest is higher than it is in England at the present time. In the *American Colonies* the rate of interest has varied at different times from 10 to 6 per cent., and in the *East Indies* it was fixed by Act of Parliament at 12 per cent.: yet all these several rates of interest have been recognised by the courts of law in England; and although a doubt had been raised how far contracts made in England, did not fall within the express words of the statutes of *Anne*, so as to render any contract at a higher rate of interest than thereby prohibited, void, yet that doubt was removed by the 14th *Geo. III*, c. 79, any such contracts were expressly protected. There never was a doubt but that they were at all times legal, and might be enforced in the Colony where they

(1) 2 Meriv., 160. (2) 4 Burr., 2,500.

were made. There is an opinion ascribed to *Pemberton*, in arguing the case of *Blankard v. Galdy* (1), that the statute of *Anne* did not apply to Jamaica; but I rest no argument upon that *dictum*; my own opinion is formed upon the clear principles laid down by Lord *Mansfield* and Sir *William Grant*, in determining whether a particular statute applies to the Colonies; upon the universal precedent of every colony under the Crown; and upon the invariable usage of this Colony, since its first settlement. I think I understood a part of my brother *Burton's* argument to be, that the American Colonies were settled at different periods of time, and that they took with them the rate of interest in force in England at the date of their respective settlements. Admitting the fact to be so, it does not appear to me to alter the case. If the statute of *James*, limiting the interest of money at 8 per cent., were in force when *Jamaica* was first admitted to the privileges of an English Colony, it became the law of Jamaica, and could not afterwards be repealed or altered by the Legislature of that island. Yet my learned brother admits, that by an Act of the Assembly, passed after the settlement of that colony, the rate of interest was fixed at 10 per cent. By His Majesty's proclamation in 1763, the Island of *Grenada* was declared to be an English Colony, and admitted to a full participation of all the rights and privileges which were enjoyed by the other American Colonies; and consequently the common law of England, with all the modifications, additions, and restrictions, from time to time engrafted upon it by statute, became the law of that newly-established colony, subject only to the consideration, how far they were applicable to the condition of the inhabitants. If the Statute of *Anne* were a necessary part of the English law, then it was as fully in force in *Grenada*, as if it had been expressly named in the Statute, and the legal rate of interest was, and could only be 5 per cent. Yet we find that the Assembly of that island, shortly after it was established, fixed the local rate of interest at 6 per cent. In the *East Indies*, where His Majesty's subjects are governed by the general laws of England, it was never supposed that the usury laws were in force. Indian interest, as it is called in the books, was always allowed upon Indian dealings. The case of *Ekins v. E. I. Comp* (2) is in point. That case was decided in the year 1717, and it was referred to the Master, by the Chancellor, to compute interest according to the rate allowed in India at that time. It is indeed true that the rate of Indian interest was afterwards fixed by Act of Parliament (13 Geo. III, c. 63) at 12 per cent.; the terms of the Act imply that there was no legal prohibition to taking that, or any higher rate of interest in India

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(1) 4 Mod., 222.

(2) 1 P. Wms., 396.

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before. And yet what sound distinction can be drawn between the commercial dealings and money transactions of His Majesty's subjects in India, and in New South Wales, so as to support an argument in favour of the application of the usury laws to the one, and not the other? In principle I see no difference between them. It will not be contended that India is a foreign country, governed by the laws of the Gentoo, the Hindoo, or the Musulman—these laws cannot apply to the contracts and dealings between His Majesty's subjects in India; they are governed by the laws of England, in the same manner as we are, that is, so far as such laws are adapted to their local circumstances; and if the statute for regulating the interest of money be a necessary and inseparable part of those laws, then was it as binding upon British subjects in India, as it is upon the inhabitants of New South Wales.

But there is another objection which it appears to me, in the absence of all others, would be conclusive against the introduction of the statute of *Anne* into this Colony, it has never been used by the inhabitants or enforced by the Courts; and it has been the invariable practice to allow a higher rate of interest than is allowed by the English Act. That *usage* generally, in the colonies, is respected, it will not be necessary for me to contend, after the opinions of the eminent persons I have cited. If it were, the statute 25 *Geo. II*, 6, c would fully bear out the position. That Act was passed to remove certain doubts which have been raised as to the execution of wills under the statute 29 *Charles II*, usually called the statute of frauds, and as this latter statute was in force in some of the colonies, and not in others, it became necessary to extend and confine the provisions of the amending Act to such of the colonies as had received and acted under the statute of frauds. The Act of *Geo II* therefore recites the partial adoption of the Act of *Charles II*, and enacts that its own provisions should extend to such of the Colonies where the statute of Charles II was by an Act of the Assembly made, or by usage received, as law. This recognition by Parliament of the force and effect of local usage in determining the application of any particular statute to the colonies is too strong to be overthrown; it was used advisedly, and upon an occasion when the applicability of a statute was the subject of enactment; it amounts therefore to a parliamentary declaration of the law, and it is in perfect accordance with the opinion, and almost expressed in the language, used by the Crown lawyers in 1757, which I have already referred to. There is a wide difference between the usage here mentioned and the particular customs which have been alluded to by my brother Burton, and which require, in order to entitle them to

legal force, that they should have existed beyond the time of legal memory. Such customs are in their nature partial usages, confirmed to particular places, as distinct from the country at large, and are a departure from the general law; they require therefore to be proved before they can be admitted, and are never extended beyond their local limits, or precise practice. The usage I contend for is not a custom of any particular place—it is the *non-user* of an English statute, by the whole of the inhabitants of the Colony, since its settlement—of a statute confined in practice to the limits of England, and not observed in any other part of the British Empire.

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Upon every view of the case, therefore, I am of opinion that the statute of *Anne* forms no part of the received law of this Colony; that it is wholly inapplicable to its condition, and is therefore not in force. In coming to this conclusion, it is satisfactory to me to find that the principles of law are not at variance with the rules of equity, or opposed to the interests of the colony. The adoption of the opposite conclusion, had it unfortunately been the opinion, must have led to the most embarrassing results—results which it would be, perhaps, impossible to calculate in the extent of confusion and ruin that might have ensued. What would be the probable consequence of this Court, holding that all contracts for receiving a higher rate of interest than 5 per cent. were usurious, and therefore void? The Banks must immediately close—confidence would be at an end—the dishonest debtor would avail himself of the decision of this Court to avoid payment of his just demands. It is true the Legislature is at hand to remedy the mischief; but before I could consent to make this Court the medium of so devastating a decision, as to call upon the Legislature to apply retrospective and wholesale remedy, I must first satisfy myself that such is the stern and inveterate decree of the law; that the obligation imposed upon me by positive law is too clear to be misconceived, and too strong to be evaded; and that I have no discretion but to say *ita lex scripta est*.

Let me not, however, be mistaken; the laws of England are our birthright where they apply to our condition, and can be administered to us with advantage; but where they are inapplicable they are not in force, and where they are silent then there is no law, unless established by the general consent and usage of the Colony at large or the local Legislature, both being alike subordinate to the great and sovereign principle that our local laws and usages must be reasonable in themselves and not repugnant to the general laws of the parent country.

Upon the second question, which arises out of the first, viz.—whether, assuming that the usury laws do not apply to this Colony, the Court

1833. will enforce any rate of interest whatever that may be agreed upon
 MACDONALD between the parties—it is not necessary in this case that we should
 v. decide that point solemnly ; but, as at present advised, I see no reason
 LEVY. why judges and juries should not continue to apply the same consider-
 Forster C.J. ations to all cases of this kind as they have done heretofore, and to give
 such interest, by way of damages, as they think reasonable, and according
 to the usage of the place—a usage which is presumed to be in the
 knowledge of all the parties, and to enter into and form an implied
 portion of all their contracts.

For this course of proceeding it would not be difficult to find ancient precedents, if it were necessary to justify it by authority. But I apprehend that we are not bound to give any solemn opinion upon the abstract question, whether there is any legal limit to the rate of interest which may be recovered, besides the convention of the parties, and I see no sufficient reason to disturb the practice which has hitherto prevailed at *nisi prius*. Should such a question be raised of sufficient magnitude to require a complete and final adjustment, I apprehend that the Legislature alone possesses the power of fixing the rate at which interest in all cases may be demanded, and enforcing it by penal consequences.

In conclusion I must repeat my regret at being compelled to differ from my brother Burton, for whose opinion in this case I entertain so high a respect that to dissent from his judgment is to raise a doubt of the correctness of my own. I fully appreciate the value of the researches he has made, and the alarming facts he has brought to light. He has I think established a sufficient case to call for the interference of Legislature.

(1) DOWLING, J. I entirely agree in the opinion delivered by the Chief Justice ; and, after the elaborate view which His Honor has taken of the subject, I do not think it necessary to go very minutely into the grounds of my concurrence. The substantial question involved in this case is, whether the English statutes of usury can now be enforced in the Colony, by operation of the 24th section of the New South Wales Act, 9 *Geo. IV* cap. 83, which enacts, “That all laws and statutes in force within the realm of England, at the time of the passing of this Act, shall be applied in the administration of justice in the Courts of New South Wales, so far as the same *can* be applied within the said Colony.”

(1) Verified from his Honor's notes, vol. 83, p. 1, but evidently much fuller than originally entered therein.

This is the first time, I believe, that the question of the applicability of the English usury laws to this Colony has been formally raised, since its foundation. I have made diligent inquiry to ascertain whether it has ever been a subject of discussion, and it seems to have been taken for granted, by the local Government, by the authorities, and by the inhabitants, that those laws, though parts of the statute law of England do not extend to this Colony, notwithstanding it had been originally settled by Englishmen. By a Government order, issued on the 14th July, 1804 (now nearly thirty years since), after reciting that enormous interest had theretofore enacted, the rate of interest was limited to 8 per cent., under pain of subjecting the parties taking a larger rate, to the penalties of the statute 13 *Anne*. This, as far as it goes, though not a *legislative* declaration upon the subject, shows, as matter of practice, that the local Government, as it then existed, did not recognise but disclaimed these laws as applicable to the Colony. From that time until the present, the rate of interest has fluctuated, and has generally been matter of contract, between the parties, but almost always exceeding 5 per cent. Since the statute 4 *Geo. IV*, cap. 96, New South Wales has had a local Legislature of its own, and the only instance in which the Legislature has legislated upon the subject of interest, has been by the late ordinance for establishing a savings bank, by which the trustees are empowered to lend money at interest, not less than 8 per cent. As far as the sense of the local Legislature can be collected upon such a subject, by a solitary enactment, this goes to show that they did not consider the English usury laws applicable to the Colony. In 1828, when I became a judge in this Colony, I found that 8 per cent. was regarded by my brother judges, by the professors of the law, by the whole mercantile body, and indeed by universal assent, as the just and reasonable rate of interest payable for money lent on securities. I certainly do not know of any other foundation for this rate of interest, than the common assent of the whole community, that such was the fair value of the use of money in the Colony; and I take it that the common assent of those who are to be affected by a practice or usage, though opposed to the express terms of an English Act of Parliament relating to the local police of the mother country, must be regarded of some validity with us, in determining the present question. Until the present occasion this rate of interest has been allowed by the judges, assessors and juries, as the just rate of interest. On some occasions lately, parties have even gone the length of demanding 10 per cent. on the ground that this was the common rate of interest received by bankers and merchants on discount transactions; but I believe the

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Court has in no instance allowed more than 8 per cent. to be taken, unless there was an express contract to the contrary. Although it has thus been considered that the usury laws of England do not apply to this Colony, yet the Court has never yet held that the spirit of those laws is not in full operation, in the administration of its equitable jurisdiction. Where fraud, collusion, or circumvention, has been used in taking advantage of a needy borrower, the Court has invariably afforded relief against usury, in the odious sense in which that offence is treated in the statutes of usury. However tacitly the usury laws of England may have hitherto been disregarded, I think my learned brother Burton, who has conscientious doubts upon the subject of letting a matter of so much importance rest upon so very precarious and uncertain a footing as *non-user*, or rather disregard of the statutes of England, is by no means to be discommended for suggesting the necessity of having this matter duly considered. This is certainly not the time nor the place to enter into any consideration of the policy of those statutes; but I may be permitted to observe, as matter of history, that very able and enlightened men in the mother country have questioned their policy, as they regard the commercial enterprise of Great Britain. The simple question for our determination is, whether they can *now*, for the first time, be put into operation, without the help of the local Legislature? There is no doubt that the words of the New South Wales Act, 9 *Geo. IV*, c. 83, s. 24, are very strong. The laws of England, in force at the date of that Act, "shall be applied in the administration of justice, so far as the same *can* be applied within the Colony." I, however, agree with the *Chief Justice* in his exposition of this section. I do not regard it as a positive mandatory obligation, that *all* the laws of England shall be applied in the Colony, because by *possibility* they may be enforced. If we were to read the Act of Parliament so we might be compelled to impart and act upon laws, wholly inapplicable to the state of society in this infant settlement, although we were possessed of the machinery proper for carrying them into operation. It would be no difficult matter to recite numerous Acts of Parliament passed before the 9 *Geo. IV*, c. 83, which could by *possibility* be put in force in this Colony, though highly detrimental, and wholly unsuited to the wants and condition of the community. As a general proposition, therefore, it is not quite correct, that because an English statute *can* be applied to the Colony, it *must* be applied. Who is to determine the applicability of the law? Parliament has made provision for this, by enacting in the same section that, "it shall be the *duty* of the Supreme Court as often as any doubts shall arise upon the trial of any information or action, or upon any

other proceeding before them, to adjudge and decide as to the application of any such laws or statutes in the said Colony." By what test are the Judges to perform this duty? Surely by their local and judicial knowledge of the actual state of the country in which they are called upon to administer justice, I admit that in this the Judges have a very wide discretion vested in them; but this like all other discretionary functions, is to be exercised, not wildly, and without rule, but upon a sound and deliberate consideration of the whole subject, with reference to the actual state of the Colony. I certainly am not prepared to say that the usury laws, are such as *cannot* be applied in the administration of justice in this Colony. I know of no legal obstacle or want of machinery in the way of their administration. As a matter of fact they have never yet been administered in, or been deemed applicable to the Colony. Their non-applicability, rests upon one unbroken course of desuetude since 1787, when the first English fleet arrived. The learning upon the subject of usages and customs, applies only where there are not written laws to guide a court of justice. If the actual rate of interest payable in this Colony, were to depend upon usage and custom, it is clear that it could not stand, because the rate has been perpetually varying according to the actual value of money, from the fluctuations of the market and local circumstances. I rely, not upon the usage as to the rate of interest, to show the inapplicability of these laws, but upon the universal assent to their inapplicability, manifested by acts and declarations of the local Government; testified by decisions of the courts of justice, silently allowed by the local Legislature since the Colony has had a Legislative Council (except in the confirmatory instance of the Saving's Bank Act), and practically acknowledged by the mercantile and agricultural interests of the community. Are these considerations to be disregarded in determining the present question? The point, therefore, for us now to adjudge (as in duty bound by law) is, whether after the lapse of forty-five years (*i.e.* from the formation of the Colony) during which thousands upon thousands of pounds have been invested upon securities, bearing more than 5 per cent. interest, and when at this moment all pecuniary binding transactions in this Colony are not regulated by the usury laws, but by the supposed fair, marketable value of money—we can hold that those laws must be applied. It appears to me, that in the due exercise of the powers delegated to the Judges of this Court, we cannot, with reference to the past and present condition of the Colony upon this subject, hold the usury laws to be applicable. To do so would be productive of great individual hardship and injustice, for if the usury laws have been

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1833. always applicable to this Colony, every money transaction in which
MACDONALD more than 5 per cent. has been stipulated for forbearance, must be
" set aside, and the usurers subjected to the most grievous penalties, the
LEVY. public credit of the Colony must be shaken to its foundation, and the
Dowling J. most irreparable injury produced. If this determination shall have
the effect of calling the attention of the local Legislature to the
subject, and of suggesting to them the expediency of exercising the
powers vested in them by the New South Wales Act, "to declare
whether these laws shall be deemed to extend to the Colony, and to be
of force herein, or to make and establish such limitations and modifica-
tions of those laws as may be deemed expedient in that behalf," the
Court will have done all that can be required of it by the provisions
of the Act of Parliament. On the whole of this case, I am of opinion
that the plaintiff is entitled to calculate interest, on the promissory
note in question, at and after the rate which assessors and jurors have
been in the habit hitherto of allowing in this Court in like cases—
namely, 8 per cent.

THE KING v. STEEL. (1)

1834.

Information of intrusion—Plea of “not guilty”—§1 Jac. I, cap. 14—Crown grants—Adverse possession—Prerogative of the Crown.

Oct. 24.

Forbes C.J.
Dowling J.
and
Burton J.

In an information of intrusion, where the defendant pleads the general issue by Statute, he must, to obtain the benefit of the Statute, prove that the King has been out of possession for twenty years.

The King is the possessor of all the unappropriated lands of the Colony. Possession of land claimed by the Crown may be recovered by it, by information on the record, although the possession of the defendant be adverse.

Crown lands can only be alienated by means of a record—that is, by a grant, by letters patent, duly passed under the Great Seal of the Colony, according to law, and in conformity with His Majesty's instructions to the Governor.

TRIAL AT BAR, before FORBES, C.J., DOWLING and BURTON, JJ., and a special jury. (3)

This was an action (2) brought by the Crown to recover possession of a piece of land, situated in Macquarie-street, in the city of Sydney. Defendant pleaded the general issue. The Solicitor-General, who opened the pleadings, called on the defendant to show a possession of twenty years, under the Statute allowing the general issue to be pleaded.

Wentworth for the defendant. The plaintiff is bound to prove his title, and the Statute of James I, cap. 14, does not require the defendant to prove a negative, viz., that the King has been out of possession twenty years. *The King v. West*.

The *Attorney-General* and *Solicitor-General* for the Crown. Before the Statute of James was passed, the King by his prerogative might force the defendant, in information of intrusion, to plead *especially*, and if only “not guilty” be pleaded, the defendant would lose his possession, because the King's title appears on record, *Howard's Ecchequer* 254, *Dyer* 238. How far the statute makes an alteration appears in the preamble, reciting “that His Majesty was willing to forego a part of his ancient prerogative, when the King, or those under whom he claims, have been out of possession for the space of twenty years; in such cases the general issue may be pleaded, and defendant retain possession until the King's title be tried and found.”

(1) *The Sydney Herald*, Oct. 30, 1834. (2) Information of intrusion.

(3) Copies of the information are contained in the Note-book of His Honor, Mr. Justice Dowling, vol. 104, pp. 31 and 76.

1834. The condition then is, that the King has been out of possession twenty years, otherwise there is no change made in the common law. The fact must be proved though it involves a negative, since the law presumes the affirmative, viz., that the King is the rightful owner. *Gilbert Evidence*, 148. *The case of Lord Halifax, Peake 5, case cited by Lord Ellenborough, 3 East, 199.*

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The CHIEF JUSTICE said that the Crown had the prerogative right, on an information of intrusion, of putting the defendant upon showing his title specially, and that he could not rely merely upon his possession. In this consisted the difference between the Crown and the subject. The King, as the universal occupant, was presumed to be in possession until the contrary appeared; whereas, in case of the subject, the fact of possession was a sufficient title for the defendant until a better was shown. This prerogative of the Crown had been restricted, to a certain extent, by the Statute of James I, by which it was enacted that when the King should have been out of possession, or should not have taken the rents and profits of any lands or hereditaments, within the space of *twenty years*, before any information of intrusion brought to recover the same, in every such case the defendant might plead the general issue, instead of pleading specially, if he should think fit, and that in such cases the defendant should retain the possession he had at the time of the information exhibited, until the title should be *tried, found, or adjudged* for the King. In the interpretation of this statute the same rule must prevail as in other cases, and being in restriction of the King's prerogatives, it was not to be extended by construction beyond the express limits. The statute professed its intention "to remit a part" of the royal prerogative in certain cases only, namely, where the Crown had been out of possession for twenty years. The defendant, to entitle himself to the benefit of this remission, must prove that he came within the terms of the statute; that the proposition itself was affirmative, although the proof might be in the negative. The defendant pleaded not guilty to the information, and upon this plea he must be evicted at common law, unless he could prove that the King had been out of possession for twenty years. The *onus probandi* therefore lay on the defendant.

Wentworth (having called evidence to show possession by the defendant for more than twenty years). This is proof of twenty years' adverse possession, which would bar ejectment. It is laid down by divers authorities that when a subject is barred of entry, the King can only take by inquisition or office found, *Stamford's Prerogative, Bacon's Abridgment*.

The point was reserved. After the evidence was concluded,

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Wentworth, addressing the Court and Jury, contended that the original lease (under which the defendant's predecessors had entered into possession) was at an end after the expiration of the first five years, and as there was no renewal of that lease, there was an adverse possession. There was a *deforcement*, and this was not the proper way to try the question. He cited *Bacon's Abridgment*, and 3 *Blackstone's Commentaries*. The doctrine of prerogative rights did not apply to this Colony.

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The *Solicitor-General* quoted *Adams on Ejectment*, to show that when the possessor once acknowledged the title of the claimant, there could be no adverse possession.

Before putting the case to the Jury, the *Chief Justice* shortly consulted with the two other Judges, and then summed up the case to the following effect.

"Before I put the case to the Jury, I will state the opinion of the Court upon the point of law made by the learned counsel for the defendant, and addressed to us as a ground for directing the Jury to find a verdict for the defendant, inasmuch as the King cannot be non-suited. The text law which has been cited from the Crown, is laid down in *Staunton's Prerogative*, in the following manner:—"With respect to the necessity of having an office, the rule is, that in all cases where a common person cannot have possession, neither in deed nor in law, without an entry, the King cannot have it without an office, or other record." Assuming this to be, as it is contended, a case in which the subject would be driven to his entry, to entitle himself to possessions, still the rule, as it is laid down with respect to the King, is satisfied by the present proceeding. This is an information to entitle the King to possession of land to which he lays claim—the information before the Court, is presented *ex officio* by the Attorney-General, and is of record. It is expressly laid down in Lord Coke's fourth Institute, page 116, as the reason why, upon not guilty pleaded, the defendant would be immediately evicted, that the King's title appears upon the information, and no title appears upon record for the defendant. But, bringing the case to the text of a right of entry in the subject, there is nothing in the facts in proof before the Court, which would take away the subject's right of entry at common law—suppose ejectment brought by Mr. Palmer, standing in the place of the King, what would prevent his recovering, except the Statute of Limitation (21 Jac. I, cap. 10) which takes away the right of entry, after twenty years adverse

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possession ? That Statute does not apply to the Crown. I mention the Statute to show that, at common law, the right of entry would have subsisted in a private party; and it is by the criterion of this right, as it stood at common law before the passing of the Statute, that the rule, as laid down by Staunton, is to be interpreted. It is, however, not necessary to pursue this argument—the present is a proceeding by information on the record, to obtain possession of the land claimed by the Crown; it is a proceeding by due course of law, in which the title of the King may be disputed and disproved by the defendant, or tried and adjudged for the King. There is no peculiar virtue in an inquest of office; upon the proofs now before the Court, it must have been found for the Crown, and a *scire facias* would have put the defendant upon showing his title—such a course of proceeding would it last have come to the same point, as it is at present before the Court. Gentlemen of the Jury, this is an information, in the nature of a civil action, brought by the Crown to recover the possession of a piece of ground situate within the town of Sydney. In placing the case before you, I must briefly advert to the argument of the learned counsel, who has powerfully appealed to you in behalf of the defendant. It has been well observed by the Solicitor-General, that this argument would have been properly used if we were sitting in the Legislature to make laws, and not in a Court of Justice to administer them. Gentlemen, we are sworn as Judges, to lay down the law as we find it, and you are sworn as Jurors, to find a verdict according to the evidence—it is not for us to assume the office of legislators—the Constitution has placed this power in other hands; and if there be any things in the present laws which require alteration, or admit of amendment, the remedy must be sought in the appointed Legislature of the Colony, and not in us, who are only the Ministers of the law, as it is laid down for our guidance. By the Act of Parliament, under which we are now assembled, the laws of England are directed to be applied in the administration of justice, so far as they can be applied. By the laws of England, the King, in virtue of his crown, is the possessor of all the unappropriated lands of the Kingdom; and all his subjects are presumed to hold their lands, by original grant from the Crown. The same law applies to this Colony. It is a matter of history that New South Wales was taken possession of, in the name of the King of Great Britain, about fifty-five years ago. This Court is bound to know judicially, that an Act of Parliament passed in the 27th year of King George the 3rd (cap. 2), enabling His Majesty to institute a Colony and civil government on the east side of New South Wales. The right of the soil, and of all lands in the Colony, became vested immediately upon its settlement, in His Majesty,

in right of his crown, and as the representative of the British Nation. His Majesty by his prerogatives is enabled to dispose of the lands so vested in the Crown. It is part of the law of England, that the prerogatives, can only be exercised in a certain definite and legal manner. His Majesty can only alienate Crown lands by means of a record—that is by a grant, by letters patent, duly passed under the Great Seal of the Colony, according to law, and in conformity with His Majesty's instructions to the Governor. It is also a clear rule of the same law, that the right of the Crown cannot be taken away, by an adverse possession, under sixty years. The Nullum Tempus Act, as it is called, was expressly passed to limit the remedy for the recovery of lands belonging to the Crown, to sixty years—without the statute, there would have been no limit of time—for it is a maxim of law, that the King cannot be disseized of his possessions; no laches are imputable to him—*nullum tempus occurrit regi*. Unless therefore the King has been out of possession of the land now claimed, for full sixty years, there is no defence in point of the mere times of adverse possession, to this action. The defendant indeed claims under the Crown; his title is derived from a lease of Governor King's in the year 1802. It is not necessary to go further than this evidence of the defendant's, for independently of the notoriety of the fact, that the first settlement of the Colony was within fifty years ago, the defendant having by his own showing, derived his title, and received possession of the ground, by lease from the Governor, as the representative of the King, cannot now be heard to dispute the superior title of the Crown. He is estopped in law by his lease. The lease was for five years, from 1802, with a promise of a renewal at equal intervals, so as to make twenty-one years altogether. In point of fact the lease was not renewed, for some reasons set forth in the correspondence in evidence before the Court, but those reasons form no part of the present case. With the equity of the defendant's claim to compensation, we cannot deal—that lies between the defendant and the Executive—the issue now before us is one of simple fact, whether the defendant has made out his claim to possession, either by a subsisting grant from the Crown, or by an uninterrupted adverse possession of sixty years. There is no proof of either before the Court—there is no plea or pretence of a license to occupy under the Crown, so as to take away the trespass—and as the defendant has proved that he held under the Crown in 1802, he has made out such a case for the Crown, as by his own showing, must put him out of Court.

DOWLING and BURTON, JJ., concurred.

Verdict for the Crown.

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ALLAN v. BULL. (1)

Feb. 20.

Criminal information—Libel—Affidavits—Costs.

Forbes C.J.
Dowling J.
and
Burton J.

Criminal prosecutions for libel in this Colony proceed on the same principles as in England.

APPLICATION to make absolute a *rule nisi* for a criminal information against the defendant for libel.

Foster, for the applicant, moved that the rule be made absolute.

The *Solicitor-General*, for the defendant, showed cause. The libellous paragraph in the newspaper is not pointed out in the applicant's affidavit, *Chitty's Criminal Law*, Vol. 4. The rule served upon the defendant called on him to answer a charge of libel, but nowhere in the applicant's affidavit is the publication referred to as one of libel upon himself. I understand that when the rule was moved for by my learned friend, he charged three distinct offences against the defendant, viz., an attempt to pervert the course of justice, a libel upon the applicant, and a libel upon one of the Judges of the Court. Which of these was the defendant called upon to answer? They cannot be embodied in one information, therefore the applicant must elect. The defendant has not ventured to deny the truth of the publication in his affidavit.

Foster. It is not necessary under the *New South Wales Act* (2) to make any such affidavit, unless it shall appear to the Court that the justice of any particular case requires it.

The *Solicitor-General*. It is the universal practice in such cases elsewhere, and if in no case that practice were adopted here, the Court would be bound to grant an information upon the mere motion of the party applying.

The CHIEF JUSTICE. I apprehend we would. The principle upon which criminal prosecutions of this nature proceed here are the same as in England. It is because such publications are subversive of the public peace; and it has been stated, over and over, from this Bench, that, under the *New South Wales Act*, the Judges feel themselves bound, whenever a *corpus delicti* is shown—whenever a sufficient *prima facie* case is laid before them—to send it to a Jury.

(1) The *Sydney Herald*, Feb. 22, 1836. (2) 9 Geo. IV, cap. 83.

The *Solicitor General* then read an affidavit by the defendant justifying the publication in question and denying any attempt to pervert the course of justice. He contended that this was all his client was called upon to answer.

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Foster, in reply.

BURTON, J., said he had a perfect recollection, that the application to the Court on Saturday last, was for a criminal information against the defendant, for a publication tending to prejudice a trial then at issue in this Court, but which was also asserted, in the course of argument, to be a libel upon the applicant personally, as well as upon one of the Judges. The specific application, however, as he understood it, was for a criminal information against the defendant as the publisher of an article which tended to interfere with the due course of justice. He thought that the rule had gone too far, and was of opinion that it ought to be set aside, and the applicant allowed to take out another more in accordance with the terms of the affidavit upon which he had grounded his motion.

The CHIEF JUSTICE and DOWLING, J., concurred.

After argument the *rule was discharged* by the Court *with costs*.

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REX v. JACK CONGO MURRELL. (1)

Feb. 19.

Aboriginals—Jurisdiction of the Court.

Forbes C. J. Aboriginals within the boundaries of the Colony are subject to the laws of the Colony, and there is no difference between an offence committed by them upon a white man and an offence upon another aboriginal.
Dowling J.
 and
Burton J.

DEMURRER TO AN INDICTMENT. The prisoner had been charged with the murder of one *Definger*, another aboriginal.

S. Stephen in support of the demurrer. This country was not originally desert, or peopled from the mother country, having had a population far more numerous than those that have since arrived from the mother country. Neither can it be called a conquered country, as Great Britain was never at war with the natives, nor a ceded country either; it, in fact, comes within neither of these, but was a country having a population which had manners and customs of their own, and we have come to reside among them; therefore in point of strictness and analogy to our law, we are bound to obey their laws, not they to obey ours. The reason why subjects of Great Britain are bound by the laws of their own country is, that they are protected by them; the natives are not protected by those laws, they are not admitted as witnesses in Courts of Justice, they cannot claim any civil rights, they cannot obtain recovery of, or compensation for, those lands which have been torn from them, and which they have probably held for centuries. They are not therefore bound by laws which afford them no protection.

The *Attorney General, contra*. The laws of Great Britain do not recognise any independent power to exist in a British territory. This country is held by occupation, not by conquest or cession. The law is bound to protect every person who comes to this Colony, and to it he is amenable.

Stephen in reply.

Cur. adv. vult.

April 11. The CHIEF JUSTICE said that a demurrer had been filed, denying the jurisdiction of the Court, which must be overruled, as the Court had jurisdiction in the case. On a former occasion of this kind, His

(1) The *Sydney Gazette*, Feb. 23, April 12, 1836.

Majesty's Attorney-General had put it to the Court whether he should bring such a case before the Court, and whether it was the description of crime which would be recognised by the laws of England; the Judges had then stated that it was for him to use his sound discretion in the case, but on that occasion no discussion took place as to the authority of the Court—no opinion was given as to their jurisdiction. The reasons for this decision had been drawn up by His Honor, Mr. Justice *Burton*, with the concurrence of himself and His Honor Mr. Justice *Dowling*.

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Forbes C.J.

BURTON, J., said—1st. That although it might be granted that on the first taking possession of the Colony, the aborigines were entitled to be recognised as free and independent, yet they were not in such a position with regard to strength as to be considered free and independent tribes. They had no sovereignty.

2nd. The Government proclamation laid down the boundary of the Colony, within which the offence of which prisoner was charged had been committed; the boundaries were Cape York in 10° 37' South, Wilson's Promontory in 39° 12' South, including all the land to the eastward and the islands adjacent.

3rd. The British Government had entered and exercised rights over this country for a long period.—9 Geo. 4 c. 83.

4th. Offences committed in the Colony against a party were liable to punishment as a protection to the civil rights of that party. If a similar offence had been committed at home, he would have been liable to the Court of King's Bench.

5th. If the offence had been committed on a white, he would be answerable, was acknowledged on all hands, but the Court could see no distinction between that case and where the offence had been committed upon one of his own tribe. Serious causes might arise if these people were allowed to murder one another with impunity, our laws would be no sanctuary to them. For these reasons the Court had jurisdiction in the case.

Demurrer allowed.

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Feb. 19. *English Marriage Act, 4 Geo. IV, c. 76—9 Geo. IV, c. 83—Bigamy—5 Will. IV, No. 2.*
Forbes C.J.
Dowling J.
and
Burton J.

The English Marriage Act, 4 Geo. IV, c. 76, is not in force in this Colony,—1st, because it is, by express terms, limited in its operation to England alone; 2nd, because the Act cannot be applied to this Colony; and 3rd, because the local Legislature has made other and different provisions for solemnising marriages within the Colony.

Sec. 24 of the New South Wales Act, 9 Geo. IV, cap. 83, is but declaratory of the previous law.

The local Act, 5 Will. IV, No. 2, is inconsistent with the application of the English Marriage Act (*per Sir Francis Forbes, C.J., and Dowling, J. Burton, J., dissentiente*).

MOTION IN ARREST OF JUDGMENT.

The prisoner, *John Maloney*, was convicted of bigamy. From the evidence it appeared that on December 19, 1829, the prisoner had married one *Mary Phely*, according to the forms of the Church of Rome, and at the customary place, viz., the priest's house, that he had lived with her as his wife, and had several children by her. On September 4, 1835, he married another woman by license at Liverpool, according to the rites and ceremonies of the Church of England. Both facts were found by the jury.

Stephen (*Foster* with him), for the prisoner. There is no evidence that the first was a legal marriage. By 4 Geo. IV, cap. 76, sec. 22, it was enacted that no marriage should be solemnised in any place except a church, chapel, or licensed place, where banns could be published, except by special license; and the ceremony must be performed by a person in Holy Orders, otherwise the marriage would be null and void. The proof in this case was that the alleged marriage took place in the house of Mr. Power, in Cumberland-street, at night, without banns or license. This Act is in force here by sec. 24 of the New South Wales Act.

Foster, on the same side. The local ordinance, 5 Will. IV. No. 2, only removes any difficulties that might arise in application of the Marriage Act. If the Marriage Act does not apply here, there is no act in force, for all the others have been repealed.

(1) The *Sydney Gazette*, Feb. 23, Apl. 12, 1836; the *Sydney Herald*, Apl. 18 1836; and the *Australian*, Apl. 19, 1836. Cited in *R. v. Roberts*, 1850 (*post*).

The *Solicitor-General*, in support of the conviction. The New South Wales Act contemplated a distinction between this Colony and England, and by the local Act Catholic Priests were also contemplated as well as the Presbyterians, who were particularly mentioned.

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Cur. adv. vult.

On April 11th, the following judgments were delivered :—(1)

April 11.

The CHIEF JUSTICE: The prisoner, *John Maloney*, was tried for bigamy at the late Criminal Sessions of the Supreme Court. It appeared in evidence at the trial, that on the 19th December, 1829, the prisoner was married to *Mary Haly*, by a Roman Catholic minister, according to the ritual of the Church of Rome, at the private residence of the minister, in the presence of two witnesses—it further appeared that the parties lived together for some time, as man and wife, and had a family of children—that on the 4th September, 1835, the prisoner was married a second time to one *Mary Carmody*, according to the ceremonies of the Church of England, in the Protestant Chapel at Liverpool—his former wife being still alive, and residing in the Colony. Upon these facts the prisoner was convicted of bigamy, but a point of law was raised at the trial, and reserved by the Judge, whether the ceremonial of the first marriage having been performed without the publication of banns, in the private dwelling of the Priest, and not in a place of public worship, could be held to constitute such a valid marriage in law, as would support a prosecution for bigamy, under the statute which makes the offence felony. This point has been fully argued by Counsel, and the whole turns upon the question, whether the marriage of the prisoner in 1829, assuming it to have been in all other respects legally and duly solemnised, is void by reason of the provisions of the English Marriage Act not having been complied with—or in other words, whether the Act of Parliament which regulates the solemnization of marriages in England, is in force in this Colony. I am of opinion that the Marriage Act is not in force, and the reasons upon which my opinion is founded, are the following :—First, because the Act of Parliament is, by express terms, limited in its operation to England alone; secondly, because the Act cannot be applied in this Colony; and thirdly, because the local Legislature has made other and different provisions for solemnizing marriage within the Colony.

- (1) The judgments of the Chief Justice and Burton, J., were very imperfectly reported at the time; that of the Chief Justice is taken from a later reprint of the written judgment in the *Australian* of April 19, 1836.

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Upon the first point—the words of the Marriage Act, 4 Geo. IV, c. 76, sec. 33, are these—“Be it enacted, that this Act shall extend only to that part of the United Kingdom called England.” Mr. Stephen has called the attention of the Court to the difference between the wording of this clause, and the corresponding clause in the previous Marriage Act, 26 Geo. II, c. 33, sec. 18, by which it was enacted, that “nothing in the (latter) Act contained, should extend to that part of Great Britain called Scotland—or to marriages solemnized beyond the seas.” But no argument can be drawn from this difference in the language of the Legislature, to affect the present case, one way or the other. When the Act of King George the Second passed, Ireland was a separate kingdom, and as the statutes of the British Parliament did not extend to Ireland, it was only necessary to exempt Scotland from the operation of the Act, and such parts beyond the seas, where the laws of England still continue to be observed—but when Ireland came to be included in the Union, Acts of Parliament passed after that period, extended of course to each of the three kingdoms, unless restrained by express words; and it was obviously a more simple course to limit the Act to one branch of the Union, than to restrain it from extending to the other two; and the express limitation of the Act to England prevented the necessity for repeating the clause in the previous Act, relative to marriages beyond the seas—for if the Act were confined to England only, it could not, of course, extend to the colonies. This appears to be the natural way of accounting for the enactment in its present form. As the Marriage Act now stands, it is limited in its operation to England, and England alone, in terms too plain to admit of any doubt or difference of interpretation. Assuming it then, to be very clear that the Act of Parliament was intended solely to apply to England, I take it to be equally clear, that when the Legislature expressly limits its enactments to particular places, the limitation becomes a part of the law, and until the law is repealed or altered, must be administered strictly according to the declared intention of the Legislature, and it becomes the duty of the Court not to extend it by construction. Perhaps this position will not be disputed—but it is contended that the New South Wales Act was passed after the Marriage Act, and that the former Act provides, in express terms, that all the laws then in force in England should be applied in the administration of justice in the Colony; and that the Marriage Act as part of the *lex loci* of England, is by force of the New South Wales Act, transferred to this Colony, in common with the other municipal laws of the Mother Country. This brings me to the consideration of the second point—Can the Marriage Act be applied in this Colony?

The New South Wales Act, 9 Geo. IV, c. 83, sec. 24, enacts that all laws and statutes in force within the realm of England at the time of passing that Act, shall be applied in the administration of justice in the Courts of New South Wales, so far as the same can be applied within the Colony; and as often as any doubt may arise as to the application of any law, it shall be lawful for the Governor, with the advice of the Legislative Council, to declare whether such laws shall be deemed to extend to the Colony, or to establish such limitations and modifications of the laws of England within the Colony as may be deemed expedient; and in the meantime, before such ordinances shall be actually passed, it shall be the duty of the Supreme Court, as often as any such doubts shall arise, upon any preceeding before it, to adjudge and decide as to the application of any such laws. This clause in the New South Wales Act has been the fertile subject of comment, and the Court is frequently called upon to treat it as one quite new in principle and peculiar in its provisions, but it is neither new nor peculiar; it is affirmative of the text law as it is laid down by Sir *William Blackstone* and other elementary writers, and as it has been received and acted upon in the courts of England—at least ever since the resolutions of the Privy Council, in 1722. It has always been, and must I contend always be, a preliminary point to adjust, whether the Act of Parliament, intended to be applied, is applicable to the condition and circumstances of the Colony, whether its provisions are adapted to the *status personarum* actually existing in the Colony into which it is to be transplanted. To maintain a contrary doctrine—to hold that Parliament intended to force the whole mass of English laws—the laws of an old and settled society, which have grown out of occasions, during a long course of years, and are become more refined and complicated than the laws of any other country in the world—to apply all these laws at once to an infant community, without limitation or restraint, “is a proposition much too inconvenient in its consequences to be perfectly just in its principle.” Marriage is a contract of natural law, antecedent to civil institution—it is the source from which all other social relations are derived. *Puffendorf* B. 6, c. 1—*Nam cum sit hoc natura commune animantium ut habeant libidinem procreandi prima societas in ipso conjugio est; proxima in liberis—id autem est principium urbis et quasi seminarium reipublicæ.*—*Cic de Off. L. 1, 17.* In a state of nature marriage may take place to all intents and purposes, whenever two persons of different sexes mutually engage to live together. In civil society it becomes a civil contract, sanctified indeed by religious ceremonies, and subject to regulations adapted to the circumstances of the community in which the contract is made. But all unnecessary

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1836. impediments to this union of the sexes, are innovations upon the rights of mankind, and become injurious to the interests of society. REGINA v. MALONEY. Restraints upon marriages, observes Sir *William Blackstone*, especially among the lower class, by hindering the increase of the people, and to religion and mortality by encouraging licentiousness and debauchery among the single of both sexes, and thereby destroying one end of society and government, which is *concubitu prohibere vago*, 1 *Com.* 438. *Forbes C.J.* By the ancient law of usage marriage among the Christian states of Europe, before the decrees of the Council of Trent, and by the law of England, until the reign of King George the Second, the consent of two persons, able to contract, expressed in words of present mutual acceptance, technically known by the name of *sponsalia per verba de presenti*, without the intervention of a priest, constituted an actual and valid marriage, 2 *Haggard, B.* 82, 2 *Salk.* 437, 1 *Term B.* 99. Usage gradually introduced the solemnization necessary to its perfect regularity, 1 *Salk.* 119. And the law so continued in England until the year 1754, when the Statute 26 Geo. II c. 33, was passed for the purpose of preventing clandestine marriages. This statute has been considered "an innovation upon our ancient laws and constitution," 1 *Bl. Com.* 438. The provisions of the present Act, 4 Geo. IV c. 76, are substantially the same as those of the former Marriage Act—they are adapted to the territorial division of England, the religious creed of the people, and the rites of the Established Church—they require that the banns of all intended marriages shall be published in the parish church or in some public chapel (in which banns of matrimony may be lawfully published) of or belonging to the parish or chapelry wherein the persons to be married shall dwell, according to the ritual of the English Church; and if the parties reside in different parishes, the banns shall be published in the church or chapel belonging to the parish wherein each of the parties shall dwell—that the marriage shall be solemnized in the parish church or chapel where the banns shall have been published, and in no other place whatever—that no license shall be granted by the ordinary, to solemnize any marriage in any other church or chapel than the church or chapel belonging to the parish or chapelry within which the abode of one of the parties shall have been for fifteen days immediately before the granting of the license.

From this brief abstract of some of the principal clauses of the Marriage Act, it will be seen at once, that its provisions are founded upon the ancient Ecclesiastical division of the realm of England, 1 *Bl. Com.* 111, that these territorial divisions become a necessary preliminary to the practical application of the law—that dioceses and parishes,

with their local boundaries and legal rights, are an inseparable and indispensable part of the Marriage Act. Now it is well known, that no portion of this young colony has yet been divided into parishes, with the exception of the county of Cumberland, and that only within the last year—that there is neither a parish church nor a public chapel within the meaning of the Act of Parliament, in the Colony. It is true there are places dedicated to God, where the solemnities of divine worship are performed, according to the established forms of the Church of England, and that it is usual for persons of the Protestant faith to be married therein; but the circumstances of divine worship being performed and marriages solemnized in those sacred places, does not make them either parish churches or public chapels, in the legal sense in which those words of description are used by Parliament. Assuming, however, that they are to be considered as public chapels, in which banns may be lawfully published, the question immediately occurs, to what parish do these chapels respectively belong?—what are the limits of their several chapelries, or have they any chapelries at all? It is matter of notoriety, that these chapels were built by Government, and the expenses of building, as well as of maintaining them, defrayed in part, if not the whole, out of the public Treasury—that the pews and seats are let to individuals at stipulated annual rents—that they have no limits established by law, and are neither endowed, maintained, nor regulated according to the laws in force with respect to churches and parochial chapels in England; and that in many of the settled parts of the Colony there are no chapels or public places of worship whatever. How, therefore, can banns be published after the manner required by the Marriage Act? How can a marriage be solemnized in the church or chapel belonging to the parish wherein the parties severally reside? Again, the Act assumes the existence, within the Colony, of competent legal powers to grant marriage licenses. These licenses are of two kinds,—the license of the ordinary to dispense with the publication of banns, and the license of the Archbishop of Canterbury to solemnize marriages at any other place than a parish church or a public chapel:—these powers are essential parts of the Act. I believe that, strictly speaking, there is no power vested anywhere within the Colony to grant such licenses. Until very recently, New South Wales was comprehended within the diocese of Calcutta; but since the creation of two additional Bishoprics in India, this Colony has been transferred to the diocese of Madras. How far the Bishop of India may possess the power of granting dispensations in the Colony, it is not necessary to inquire. I believe that in point of fact, no such power has been delegated to any surrogate in this

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Colony; and that the only marriage licenses in use, have been granted by the Governor. Upon the legal effect of such licenses I am not called upon to offer any opinion, and it would be unbecoming on the present occasion to do so. But I may venture to remark that if there is no express law which sanctions the practice of granting licenses, the preliminary enquiries which are instituted, and the circumspection with which they are issued, are calculated to restrain clandestine marriages, and to prevent some of the evils which the Marriage Act was intended to remedy. It is apparent, then, that some of the most material requisites of the Marriage Act are entirely defective in this Colony—that it wants the machinery necessary to its operation—that, in fact, it cannot be enforced. If the reasoning upon which these conclusions are founded should be thought too refined, I will briefly advert to the case of the *King v. The Inhabitants of Northfeld*, in which it was held that a marriage celebrated in a chapel erected since the 26th Geo. II was void, although marriages had *de facto* been frequently celebrated there; and to the case of the *Attorney General v. Stewart*, (1) in which the Master of the Rolls considered the want of an enrolment office in the Court of Chancery in Grenada a complete prohibition to the enrolment required by the statute of Mortmain, and a conclusive argument against its application to that Island. How much stronger then is the objection to the application of the Marriage Act of England to this Colony, in which, not parts of the necessary machinery merely, but the whole foundation of the structure is deficient? It is not necessary to dwell upon this part of the case any longer. I will therefore close my remarks upon it by referring to an opinion of very eminent persons upon the applicability of the former Marriage Act to Newfoundland—the case occurred before I presided in the Supreme Court of that Colony, but finding it among the records of the Court, I have fortunately preserved it. Newfoundland had not at that time a local Legislature—the Supreme Court of that Colony was, like this Court, instituted by Act of Parliament, and the Act under which it sat, 49 Geo. III, cap. 27, after empowering the Court to hold plea of all suits and complaints arising within the limits of its jurisdiction, goes on to enact “that the Court shall determine all suits and complaints of a civil nature, according to the law of England, so far as the same can be applied to such suits and complaints.” The words “can be applied,” are the precise words used in the New South Wales Act, and were of course intended by Parliament to convey the same meaning in both cases. A doubt appears to have been entertained by the Chief Justice of Newfoundland as to the state of the law with respect to marriages

(1) 2 Meriv., 163.

in that Colony, and to remove it a case was made in the form of queries, and referred by the Secretary of State to His Majesty's law officers in England. The following is their opinion:—"Doctor's Commons, 11th May, 1812. We are honoured with your Lordship's commands, transmitting a letter from the Governor of His Majesty's Colony Newfoundland, stating that the Chief Justice having expressed considerable doubt of the law as it relates to marriages in the Island, had proposed the queries therein recited, to which he is desirous of obtaining such answers as may serve as a fixed authority for the rule of his future conduct, and your Lordship is pleased to desire that we should take the said letter and queries into our consideration, and to report to your Lordship our opinion thereupon. In obedience to your Lordship's directions we have considered the same, and have the honour to report that as the Marriage Act does not extend to the British Settlements abroad, the validity of marriages at Newfoundland will depend rather upon what has been the practice and custom of the place, than upon any form of celebration which is indispensably required. The law of this kingdom has agreed that the general law of the Christian Church in considering the celebration of marriage by religious ceremonies to be requisite for the perfect regularity of the marriage contract. But it acknowledges the validity of marriages contracted without such ceremonies in countries where a different rule prevails. We think that marriages solemnized by Roman Catholic Clergymen, regularly officiating, would not be liable to objection, on account of the validity of their orders; but the performance of that ceremony by laymen is an irregularity which can be justified only by necessity, or by the particular customs of the place; and we know of no principle independent of such custom on which a Magistrate can be held to be more competent to perform that office than a mere layman. It is desirable for general convenience that the practice of settlements abroad should conform, as nearly as local circumstances will permit, to the practice of the mother country. But we cannot advise particularly upon any rule that it may be proper to establish at Newfoundland, nor upon the means of doing it, without more local information than is communicated to us.—*Ohr. Robinson, V. Gibbs, Thomas Plumer.*" This opinion of the law officers is in point with the present case. The question in that case appears to have been put whether a marriage could be solemnized by any other than an ordained minister of the Church of England, but it directly involved the law of marriage in that Colony, and the application of the Marriage Act to Newfoundland. It does not seem to have occurred to the very eminent lawyers whose names are affixed to the above opinions, that the general terms of the Newfoundland Act were intended

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to control the express terms of the Marriage Act, or could be construed to extend the provisions of the latter beyond the exact limits which it had prescribed for itself; and they assumed and affirmed that the Act was not in operation in Newfoundland. The opinion to which I have referred gave rise to an Act of Parliament (57 Geo. III, c. 51) which I have occasion to know was drawn by one of the same learned persons, the late Judge of the High Court of Admiralty. The Act recites that "whereas a doubt has existed whether the law of England, requiring religious ceremonies of marriage to be performed by persons in Holy Orders, for the perfect validity of the marriage contract, be in force in Newfoundland." The doubt, it will be observed, arose upon the application of that part of the canon law which requires the intervention of a priest to the due solemnization of marriage, 1 *Bl. Com.* 439. If the Marriage Act were in force in Newfoundland, then no such doubt could for one moment have been entertained, because the whole provisions of the Act required the ministry of a person in Holy Orders—such a person only could publish the banns, perform the ceremony, or sign the register of the marriage. The recital of the Act of Parliament and the enactments which follow it, were framed upon the assumption that the Marriage Act was in force, and approach very nearly, if they do not amount to a declaration in Parliament, that it did not extend to Newfoundland. I cannot distinguish between marriages in New South Wales, and in Newfoundland, or discover one sound argument for the extension of the Marriage Act to one colony, which does not apply with equal force to the other.

Upon the last point, namely, how far the Marriage Act is affected by the ordinances of the Governor and Council, the New South Wales Act, authorises the local Legislature, as often as any doubt shall arise as to the application of particular laws, to declare whether such laws extend to the Colony or not. In exercise of this power the Governor and Council passed an ordinance (5 Will. IV, No. 2) expressly to remove any doubts as to the validity of marriages solemnised in New South Wales—the ordinance declares that all marriages before the passing of such ordinance, solemnized by ordained or officiating ministers of the Church of Scotland, as by law established, or by ordained or officiating priests or ministers of the Roman Catholic Church, shall be, and shall be adjudged and taken to have been, of the same force and effect as, and no other than, if such marriages had been solemnized by clergymen of the Church of England, according to the rites and ceremonies of the Church of England. This ordinance is both declaratory and retrospective. Now, if the Marriage Law of England was in force in the Colony, then all marriages performed by a Roman

Catholic Priest were valid, *Shrimshire v. Shrimshire* (1). Yet the local ordinance declares such marriage valid—and it could only so declare the law, by declaring as a necessary inference, that the Marriage Act had never extended to the Colony—there is no escape from this conclusion—the local Legislature has declared marriages to be legal which would be rendered illegal by the Marriage Act, if the Marriage Act were in force. But it is ingeniously contended by Mr. Foster, that the local Act was intended to mollify the Marriage Act, by enabling the ministers of the respective Churches of Scotland and Rome to perform the religious ceremonies of the contract, and to leave the secular provisions of the law to be applied as they were before the passing of the Ordinance; and in support of this argument the words of the Act, “of the same force as, and no other than if such marriage had been solemnized by clergymen of the Church of England, according to the rites and ceremonies of the Church of England,” are relied upon. But if this construction be followed through all its consequences it will lead to this anomaly—the banns must first be published in some Protestant church or chapel, by the minister, according to the form of words prescribed by the Rubrick prefixed to the book of Common Prayer, and the marriage afterwards solemnized in the same place by a Roman Catholic Priest, according to the ritual of the Romish Church. This assuredly could not have been the intention of the Governor and Council, and the words of the ordinance which have been relied upon, do not lead to so absurd a conclusion. I happen to know that the ordinance was copied verbatim from the Act of Parliament, 58 Geo. III, cap. 84, which was passed for removing similar doubts as to the validity of marriages by ministers of the Church of Scotland in India, where the Marriage Act certainly did not extend, and the words alluded to were obviously introduced into the Act of Parliament in order to prevent the mere fact of a marriage being solemnized by a Presbyterian minister, making such marriage valid in law, notwithstanding any legal impediment which would otherwise have rendered it void. Had the law not contained such a provision, it might have led to a doubt whether marriages solemnized by a Presbyterian clergyman between persons of incompetent ages, or of unsound mind, or who were married before, were not valid by the mere force of the Act. This is the simple solution of the doubt. Laying these words therefore entirely out of the case, as not affecting the question before the Court, it was certainly competent to the Governor and Council to declare the law—they have done so—they have not in terms declared the whole Marriage Act of England not to be in force in this Colony,

(1) 2 Hagg. Con. 401.

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but they have declared the manner of solemnizing marriages by other than ordinary ministers of the Church of England, to be, and to have been legal within the Colony, which is quite inconsistent and irreconcilable with their holding the Marriage Act to be in force. Upon every view of the case therefore—upon general principles of law, as well as by the aid of authority, I have come to the conclusion that the Marriage Act is confined to England—and that it cannot be applied, and is not in operation in this Colony. It will not be necessary to enquire whether the first marriage of the prisoner was in all other respects regular and valid. It appears from the notes of the learned Judge who tried the case, that the marriage was proved to have been solemnized by an officiating minister of the Church of Rome, according to the ritual of the Romish Church, in the presence of two witnesses. It was not in proof that the decrees of the Council of Trent had ever been received as of authority, by the Catholics in this Colony; and it was not necessary to the validity of the marriage that it should have been solemnised *in facie ecclesiae*, by the law of England, independently of the Marriage Act. Indeed, it is known to the Court, as a matter of history, that in the year 1829 there was no public Roman Catholic chapel duly consecrated as such in this Colony. Upon all these several grounds I am of opinion that the prisoner Maloney has been legally convicted of bigamy.

DOWLING, J., concurred.

BURTON, J., said that he differed with his learned colleagues. The question for the consideration of the Court was, whether the first marriage was valid or not; if valid, the verdict was right; if not, erroneous; was there any law to restrain illegal and private marriages? This question had probably not been decided before in consequence of its great importance, but in this case the prisoner called for the opinion of the Court whether his first marriage, solemnised as it was, if marriage it was, could be considered legal; he had a right to moot that point, and the Court were now called upon to decide upon the point.

There were many opinions whether the Marriage Act extended to this Colony; he considered that it did; and if the English Act did extend here, the first marriage was illegal, and the conviction was illegal. He was of opinion that the 24th section of the New South Wales Act, and the case of *Macdonald v. Levy* tried in that Court in 1829, settled the question. The case had been argued as if the Marriage Act applied to marriages solemnised by the Church of England only, to exclusion of all other sects, such were not the merits

of this case. One of the first objections taken was, that there were no parish churches, but there had been a political division of Sydney into parishes for many years, St. James' and St. Phillip's; in the latter the marriage took place. He held that any church in the Colony set apart as a church for a particular district, was to all intents and purposes a parish church, according to the provisions of the Marriage Acts of William and Anne. There might be few churches in the Colony, but it was within the means of the local Government to remove that cause of complaint without infringing on the law. The whole of the provisions of the Act could be carried into effect in this Colony; there was a bishop to appoint a surrogate, the Governor might be surrogate, and appoint deputies. He, as a Judge of that Court, did not hesitate to declare that the law was applicable to the Colony; on the ground of expediency it was applicable, to prevent the ruin of families by private and imprudent marriages, and the fraud and perjuries which would follow, without there was some law to prevent them. There had been a complete adoption by marriage of the Marriage Act in this Colony, as appeared by the return of marriages, married by license before the passing of the Act, after its passing, 7,648. If the Marriage Act did not apply to this Colony, why had application been made to the Court for their consent to marriages, and the appointment of guardians under the Colonial Act, 6 Geo. IV, No. 1, which proceed on the fact that the English Marriage Act is in full force in the Colony. It could not be a fallacious idea to say, that fathers would be astonished to hear that sons could contract marriage in this Colony at the age of fourteen and their daughters at twelve, without their knowledge and privacy, and yet that the marriage would be valid; it would be an unwholesome state of society. The 58 Geo. III, cap. 74, set to rights all doubts upon the subject, and proved that the Act did extend to this Colony. Adopting the Local Ordinance 4 Will. IV, No. 19, would be attended with very serious consequences. He was of opinion that the Marriage Act did extend to this Colony, consequently the first marriage was illegal, it having taken place in a house not licensed, and no banns as required by the Act having been published, the verdict was therefore wrong.

DOWLING, J., said he concurred in opinion with the Chief Justice that the Marriage Act did not extend to this Colony; every section of the Act had reference to a state of things which did not exist in this Colony. He was of opinion in reference to the present state of circumstances of the Colony, the Act could not apply.

Conviction sustained.

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Ex parte ROXBURGH. (1)

June 16.

Merchant Seamen—5 and 6 Will. IV, cap. 19—Desertion.

Dowling C.J.
Burton J.
 and
Willis J.

The magistrates have no jurisdiction under sec. 6 of Sir James Graham's Act, 5 and 6 Will. IV, cap. 19, to entertain a complaint against a seaman for desertion. Sec. 6 only applies to the port of clearance.

MANDAMUS.

In this case David Roxburgh, commander of the ship *Duchess of Northumberland*, had appeared before *H. C. Wilson, Esq.*, and *C. Windeyer, Esq.*, Justices of the Peace, at the Sydney Police Office, and charged *David Campbell*, a seaman of the said ship, with desertion, under the 6th clause of the Merchant Seamen's Act. The articles of the ship, signed by the said *Campbell*, and the log were produced. Evidence of the desertion was also given. The magistrates refused to hear the case, as they were of opinion that the Act did not apply to it. A mandamus was now moved for by the Attorney-General.

The *Attorney General*, for the applicant. The Colonial Act only applies to seamen who sign articles in this Colony, but the Imperial Act is in force throughout the British Empire.

The rule nisi was granted.

June 22.

The *Magistrates* showed cause in person. The Act in question is to encourage and protect seamen. We understand the 6th clause to provide for what is to be done at the Port of Clearance only, and to have no reference to any other Port, which is provided for by the 7th, 8th, and 9th clauses. That this is so is evident from the wording of the penalty, which, after stating the amount to be imposed by the Magistrates on proof of desertion, or leaving the ship without permission, goes on to state that it shall be chargeable to wages which shall hereafter become due.

The *Attorney General* in reply.

After consultation with the rest of the Bench, the CHIEF JUSTICE (2) said he was of opinion the rule must be discharged. He agreed as a general rule that first impressions are generally correct; but then

(1) The *Sydney Gazette*, June 19, 1838; the *Sydney Herald*, June 18 and 25, 1838; the *Australian*, June 19 and 26, 1838.

(2) The *Sydney Herald*, June 25, 1838.

all the circumstances must be fully considered before the impression is formed. The Magistrates in refusing to act under the 6th clause acted properly, and gave a just interpretation of the Act. When the rule was granted, the Judges were called upon suddenly, but they gave the Magistrates full credit for having acted from proper motives. If the attention of the Court had been confined solely to the 6th clause, the *mandamus* must have been issued; but when they looked at the whole Act, they were convinced the Magistrates had acted properly. The first part of the recital sets out that it is for the protection of commerce, and the second is that it is for the encouragement of seamen. Doubtless the Legislature, knowing the great dangers and hardships to which seamen are exposed, cast this Act over them as a shield for their protection. Taking the 6th clause of the Act in connection with the other portions, it did not refer to any middle port, but solely to the port of the ship's departure. If a seaman, about to enter on a voyage signs articles in the port of Sydney, he will be amenable under that clause. From the words of the clause, taken in connection with the 7th and 9th, it appears plain that it is intended to apply only to the place where the sailor enters into the contract. The words, "near where the ship shall happen to be," mean where she shall be when the articles are signed; if it had meant London, or any particular place, it would have said so. To read consistently with other clauses, it must refer to the case of a man refusing to join the ship after signing articles, while the next clause manifestly refers to the intermediate ports. The Act must be read sensibly, and if the construction was put upon it which was contended for by the Attorney General, it would be nonsense. This construction of the Act was no fault of the Judges; their business was to interpret the law as they found it.

BURTON, J., agreed with the *Chief Justice*. He was of opinion that the case had not suffered by being argued by the Magistrates themselves instead of by Counsel, as the reasons they had given were very cogent. His impression was against the Magistrates on the first reading of the clause; but taking it in connection with the other parts of the Act, he was convinced the Magistrates were right. He admitted the construction is inconvenient, but that was not to the purpose. He did not go the whole way with the Magistrates as to the Act being for the encouragement of seamen; he thought it could never be too strictly enforced, and it could not but have a very bad effect if it once went abroad that there was any disposition on the part of the Magistrates to deal loosely with the laws regarding seamen. In the 6th and 7th clauses the same words occur; and he did not consider it likely that

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the Legislature would give two punishments for the same offence, which are inconsistent with each other ; and if it had been intended that the imprisonment should be applied to the 7th clause, he thought that after declaring he shall forfeit two days' pay, it would have gone on to state, or be imprisoned, leaving it to the discretion of the Magistrate. It is quite absurd to talk about forfeiting clothes and wages, as it is well known that from the money that is advanced there is seldom much due to sailors when they arrive here ; and if they have clothes of any value, they take care to remove them before they abscond. It also sounds very well, in theory, to say that the master shall recover from the seaman that deserts any excess of expense he may be put to ; but, in practice, every one knows that it is impracticable. He was sorry that the Court was compelled to put this construction on the Act, as there is no enactment which will enable masters to keep their men in order, as in all cases where they may prosecute a man, the expenses of attending the Police Office will be far greater than the punishment inflicted on the men ; but this is a defect in the law which lies with the Legislature to correct.

WILLIS, J. I bow with deference to the opinion of the Court, but I trust the *Chief Justice* will not think it nonsense when I say that I cannot agree with this decree.

Rule discharged.

In re ROBERTS AND WILLIAMS. (1)

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Attorney—12 Geo. I c. 29—Punishment for practising as attorney after conviction for forgery.

July, 14.

*Dowling C.J.
Burton J.
and
Willis J.*

An attorney, having entered into an agreement with a person, who had been transported to this Colony for the crime of forgery, in order to obtain the "good will" and services of the latter in the practice of his profession, is liable to be struck off the rolls, and the clerk to transportation for seven years by 12 Geo. I, cap. 29. In this case, the facts having been admitted by the persons concerned, the Court only ordered the agreement to be cancelled.

THIS was an inquiry into the conduct of one of the attorneys of the Supreme Court.

The facts appear in the judgment of the *Chief Justice*.

At the opening of the Court the CHIEF JUSTICE inquired whether Mr. *Roberts*, attorney at law, and Mr. *John Williams* were present, and both those persons being in attendance, *His Honor* said, that it having come to the knowledge of the Judges that an unlawful agreement existed between Mr. *John Williams* and an attorney named *Roberts* for the purpose of conducting the business of an attorney in the Supreme Court, the Judges felt themselves called upon, as well in justice to the public as for the honor of the profession, to investigate the circumstances of the case, and invited both the parties to enter into an explanation, as much with a view to afford them an opportunity of vindicating themselves as for the correction of the evil. Both the parties came forward and voluntarily and candidly admitted the circumstances of the case, and while the Judges were thus relieved from what would otherwise have been an imperative task, they felt themselves called upon in the execution of their duty as guardians of the public and the profession not to pass the matter over. Although the investigation has not been conducted in open Court, there was no point in the case which, so far as the Judges were concerned, required concealment. It had been made manifest to the Court that upon the death of Mr. *Nicol Allen*, an attorney of the Court, Mr. *Roberts*, also an attorney of the Court, entered into an arrangement with *John Williams*, who had been acting as clerk to Mr. *Allen*, and who was then, and is now, a convict under sentence of transportation for forgery, and that finally for the good will of the business he agreed to give Mr. *Williams* £450 per annum, with other advantages. This

(1) The *Sydney Gazette*, July 17, 1838, and the *Australian* of the same date.

1838. agreement purported to bear date of the 4th December, 1837, but
In re was proved not to have been executed until the 27th of that month,
 ROBERTS. although in the meantime the business was carried on the same as if
Dowling C.J. *Roberts* had been in the office, the object of antedating the agreement
 having evidently been to cover this interval. Had these facts been
 brought before the court by extrinsic evidence, the Court could only
 have pursued one course, its duty is clearly laid down by the statutes:
 the one party, the attorney, must have been struck off the rolls, and
 the other must have been transported for seven years, but the Judges
 did not wish to act so stringently with the parties, as these facts came
 to the knowledge of the Court by their own admission, and they would
 only notify to the parties that the agreement must be cancelled. The
 circumstances attending the investigation had led the Judges to come
 to the conclusion that it was necessary to restrain attorneys from
 employing about the business of their offices men in *Williams'*
 situation. There may have been a time when the law on this point
 could not be strictly acted upon without inconvenience to the public,
 but that is not the case now. By the Charter of Justice the Judges
 are restrained from admitting any person to practice in the Supreme
 Court of this Colony who has been convicted of any offence that would
 restrain him from appearing in the Courts at Westminster. (His
 Honor here recited several Acts of Parliament on the subject, among
 other the Act 12 Geo. 1st, which renders any person liable to be
 transported for seven years who practices in any Court of Great
 Britain after being convicted of forgery, perjury, or barratry.) In
 order to carry into effect the plain object of the law, His Honor said,
 a case had arisen which called on the Court to take steps for the
 exclusion of all such persons from the offices of attorneys, and the
 Court considered that this rule would work no private or public
 injury, but make the profession of the law more respected and more
 respectable. The Court had hoped that a sense of what was due to
 the respectability of the profession would have rendered the rule
 unnecessary. The time had arrived when the services of such persons
 could be dispensed with, and the Court therefore made and published
 the following rule:—

It is ordered that from and after the first day of January, one thousand eight
 hundred and thirty-nine, no attorney, solicitor, or proctor of the Supreme Court
 of New South Wales, shall employ as an assistant, clerk, or writer, in or about
 his business as an attorney, solicitor, or proctor, any person who hath been or
 shall be transported to this Colony, or convicted of forgery, or any other felony,
 or wilful and corrupt perjury, or common barratry.

JAMES DOWLING, C.J.
 W. W. BURTON, J.
 J. W. WILLIS, J.

BURTON, J. said that, before proceeding to declare the reasons why he concurred with the decision which had been come to by the Court, he must state that during the investigation several cases came to the knowledge of the Judges which ought to have come to their knowledge by other means, as they must have been known to many persons who were equally interested with the Judges in preserving the respectability of the profession of the law. The law is a profession which, above all others, requires that the practitioners shall be men of high character. Attorneys are persons appointed on account of their skill and integrity to conduct the business of ignorant persons, and it is a matter of the first importance that none but such persons be trusted with the power of acting as attorneys, and on this point the law has been very astute. The very circumstances of the legal profession having a monopoly is in order that the Court may exercise a rigorous superintendence over the practitioners, and that the members of the profession may exercise a watchful superintendence over each other, and give notice to the Court of any irregularity that may exist, while if the profession was open to all, there would be no means of putting a stop to irregularity and dishonesty. It is therefore of the first importance that none but persons of virtuous character and good fame be admitted as attorneys, and that none other be admitted within the precincts of the Court. A very early statute (4 Henry IV) declares that the Justices shall control only such attorneys as are virtuous and of good fame. This was evidently intended not to confer patronage on the Judges, but to enable them to exercise a control over the persons who practice in the Courts, and see that none but those who are virtuous and of good fame, which are not words of mere form. By the statute 2 Geo. II, all attorneys are to take an oath that they will honestly and truly demean themselves as becomes attorneys. By the 3 James II none but honest men are to be admitted attorneys. By the 12 Geo. I, if any person convicted of forgery, or perjury, afterwards practice as an attorney, the Judges can inquire summarily into the matter, and, upon proof, transport the offender for seven years; and by the *Charter* the Judges are restrained from admitting anyone who has been convicted of any crime that would prevent him from acting as an attorney in the Courts of England. It thus appeared, His Honor continued, that the statute law of England is very cautious in providing that none but persons of good fame are admitted to practice in the Courts. In *Cooper's Reports* there is a case which shows the opinion of the Judges on the point. A rule had been obtained calling upon an attorney to show cause why he should not be struck off the rolls. It appeared that he had been convicted of stealing a guinea five years

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before, and had been burnt in the hand; Lord *Mansfield* said, the question was, whether after the conduct which the defendant had been guilty of, he should be allowed to remain on the rolls; he certainly thought not. Supposing a Justice of the Peace had been convicted of such an offence, the conviction would not have removed him from the commission, but it could not be said that he was a proper person to remain there, but as it was a case of some importance he would consult all the Judges. Afterwards his Lordship, who, in the meantime, had consulted the twelve Judges, said that the rule must be made absolute; the defendant must be struck off the rolls not by way of punishment for the offence he had committed, but because, having been convicted, he was not a fit person to remain on the rolls. Although there was a difference in the letter his Honor could see no difference in the spirit, between attorneys and attorneys' clerks. In the present case, however, there could be no doubt that Williams was more than clerk, and that the agreement between him and Mr. Roberts was merely colorable; it doubtless existed before between Williams and another person, and instead of being a mere working clerk, no doubt Williams was to exercise his skill as an attorney, and Mr. Roberts was to be a mere tool. The words of the *Charter* certainly restrained the Judges from admitting improper persons from acting as attorneys, but he thought that although the words "attorneys' clerks" were not used, it would have been better if, when the Judges were called upon to act under the *Charter*, they had construed it as applying to attorneys' clerks, for from improper persons acting as clerks many evils may arise, and a degraded master may make use of a very clever convict clerk for the commission of rogueries which he would be afraid to commit by himself. The laws on this subject were not mere arbitrary provisions, but proceeded on principle. The Legislature has not taken the same steps with regard to any other profession, but in all other trades or professions a person after his conviction may follow his profession the same as before. There was the sacred profession which the Ecclesiastical Courts would take care that a person, after conviction, did not profane, but there is no express legislative enactment on the subject. In the practice of physic, which is the next learned profession, and indeed in all professions and trades, a person is free to follow it after conviction of felony. The Legislature has given a monopoly for the purpose of limiting the greater control over them, and that none but properly qualified persons conduct the business in Court. He knew it was a common reproach that the law is uncertain, but it is not so, and he hardly ever heard a case where this was imputed but the uncertainty had arisen from the ignorance or mistake of the

practitioners. It is a highly important question who shall be appointed attorneys, for they not only stand in highly confidential situations, but stand in the very portals of the Court, so that none can enter but through them. Having these views, it was with regret that he found persons under sentence had been acting as attorneys and attorneys' clerks, not within the knowledge of the Court, but within the knowledge of many others, who had not done what it was their duty to do, stand forward and bring the matter before the Court. In consequence of what had transpired on the trial of Beilby he (the Judge) considered it his duty to bring the conduct of John Williams before the Court. In consequence of his having done so, Williams handed him a variety of testimonials, on which he would make a few remarks. Notwithstanding the King of England took the view of the law he had been laying down, it appeared that others took a different view. The first document he would allude to was the petition of Elizabeth the wife of John Williams, who stated that her husband arrived in 1829, and in 1832 received a ticket of leave, for having prosecuted to conviction three receivers of stolen property; that petitioner arrived in the Colony, having paid her own passage, and put the Government to no expense on that account, on the assurance of the Under Secretary of State, that immediately on her arrival here, her husband would be made free within the Colony and allowed to practice in his profession. This statement was certainly uncorroborated, but from the circumstances under which it was made, he supposed it to be true, and it certainly showed that a different view of the law was taken by that functionary. Another document was a petition presented to the late Acting Governor by Williams; it stated that the petitioner arrived in the Colony in the year 1829, and that from the 12 October, 1830, to May, 1832, while the petitioners late master transacted the law business of the Commissariat and Internal Revenue Offices, the business was managed by petitioner, who always did his best to forward the interest of the Government; that William Macpherson, Esquire, having had great difficulty to recover money under certain mortgages through the delay of the Crown Officers, requested the petitioner to draw up a form of mortgage by which he could get the money without delay; the petitioner accordingly drew up a form of mortgage containing a power of sale, which was approved of by the Attorney and Solicitor General, and afterwards printed with blanks, whereby the public business was much forwarded, that petitioner also devised and drew up a form for the security of quit rent; also an improved series of land sales, and an approved form for grants, particularly for the land in Bridge-street, where it was necessary to make parties build to a certain plan. To this

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petition was annexed copies of certain testimonials of character which were annexed to a former petition; the reason why copies instead of original testimonials were appended would easily suggest itself to the minds of the parties who signed the original petition. He certainly would have been more pleased to have seen a recommendation for mercy grounded on general good character, or as he had been employed in an attorney's office, on the ground of his having done his duty honestly and fairly, but it was certainly a novelty to find a petitioner trusting on the grounds that Williams had. He would read one of the testimonials, "I have known Mr. Williams, clerk to Mr. Nicol Allan, and during the fifteen months that he transacted the law business of the Internal Revenue Office, Mr. Williams displayed great care and pains. Of forty-two cases of which he had the management, he succeeded in twenty-seven, twelve are now pending, and one only has gone adversely, through a party who was under age signing a note." Afterwards the same officer states that he often noticed the good conduct of Williams, when he had frequent interviews with him, at the time that Mr. N. Allan was conducting the business of the office. His Honor said it was apparent that although at this time the name of Mr. Allan was used, Williams was consulted as attorney; it was known he was acting as an attorney, and his advice was taken, although at this time there was an Attorney and Solicitor General within reach. The conduct and situation of Williams must have been known to the profession, for he found certificates from several of them, which he would read; he would not mention names, but the gentleman would probably recognize the language. (His Honor here read extracts of several certificates from Counsel, speaking highly of Williams' legal acquirements and of meeting him in consultation, &c.) These certificates, His Honor said, did not go to Williams' good character as a convict servant, but to his legal acquirements. But, the situation of Williams was known not only to the profession but to the public, for he found certificates from three persons who had been his clients, and who spoke of him as conducting Mr. Allan's business, and in fact knew him as a transported person in the full management of a business as an attorney. Again, in the course of the investigation the Court had learned the startling fact that, on the death of Mr. Nicol Allan, six rival attorneys of the Supreme Court proposed themselves as colleagues to Williams; now for what could this be but for the business that Williams would bring with him? There is no occasion to mention their names: sufficient reproof would come from their own minds, for they could but think meanly of themselves when they considered the degraded situation in which they had been placed. Neither of these six

however were received, but Mr. Roberts, a seventh attorney, was the person who was elected, so that seven attorneys of the Supreme Court stood impeached with having acted in this dishonorable manner. The Court had performed its duty in reminding the profession of theirs; he trusted that the rule of Court which had been read by the Chief Justice would prove salutary. Unless the members of the profession, when they know of the existence of any irregularity, bring it before the Court, the Judges are naturally inert, for of course they cannot prosecute in a matter in which they are to be judges; but the members of the bar, the attorneys, or the public, when any circumstances come to their knowledge, should bring it before the Court. Upon looking into the matter he did not consider Williams was so worthy a character as some of the certificates appeared to consider him. With regard to the conviction of the three receivers of stolen property, he had made inquiries in the proper quarter, and found that in 1831, a man named John Williams, assigned to Mr. Macquoid, was found guilty of obtaining a box belonging to another person of the same name. This Williams was sent on board the hulk, whence he sent a letter to a woman named Wylie; this letter got into the possession of Mr. George Jilks, Chief Constable of Sydney, and through that some of the property taken in the box was traced to the possession of three persons, so that all that had been done by Williams in the matter was the identification of certain portions of his own property which had been stolen from him. From circumstances that had come to his knowledge he did not believe that Williams was such a worthy character as had been represented; on the trial of Beilby it appeared that young Beilby was in the habit of consulting Williams at the time that the scheme for defrauding the creditors was being concocted, and, although there was no positive proof that Williams knew of the fraud, yet from the part he had taken, the nature of the queries put to Williams, and the answers which were in his handwriting, he had strong suspicion that he did. The Chief Justice had said that when the matter was before the Judges the parties had answered candidly. Mr. Roberts certainly had, but he thought Williams had acted more craftily. When first asked, he said that he was confident the agreement was signed on the 6th of December, but it was afterwards proved that it was not signed until the 27th December, although the business had all along been conducted in Mr. Roberts' name; the object therefore of stating a wrong day was obvious, and when Williams' attention was drawn to the fact, he said he had been deceived by an entry in his book. There having been so much forgetfulness on the part of many persons, the Judges having been left entirely alone

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1838. in the matter, all the circumstances of the case having been known to
In re the whole community, and no one having brought the matter before
ROBERTS. the Court, only one course remained for the Judges. He fully agreed
Burton J. with his learned brethren that considering the manner in which the
Court had arrived at a knowledge of the facts, the case could not be
treated with as much severity as if it had been acquired in another
shape, and he did not think it was a case for punishment. Another
circumstance was, that from the certificates that he had alluded to, it
appeared that such had been the sense, however obtuse, of many
persons, and as they were countenanced from first to last, and had
been patronised by so many parties, he did not think it would be right
to punish them, and he, therefore, agreed with the Court, that a
middle course was the best.

WILLIS, J., concurred.

REGINA v. SCHOFIELD (1).

1838.

Gaming—18 Geo. II, cap. 34, sec. 8.*Sept. 22.*

The Act, 18 Geo. II, cap. 34, sec. 8, is not applicable to this Colony from want of machinery to carry the same into effect.

Dowling C.J.
Burton J.
and
Willis J.

There are no legally-recognised poor in the Colony.

THIS was an information filed by the Attorney-General on the stat. 18 Geo. II c. 34, s. 8, for gaming. The first count charged the defendants with winning money at cards of one *Thomas Chasling*, above the value of £10 at one time. The second count charged them with winning of the same person above £10 within twenty-four hours, that is to say the sum of £80.

At the trial before *Burton J.* during the last criminal session the Jury found *Schofield* guilty of winning £80 within twenty-four hours, and acquitted the other defendant. It was objected on the part of the defendant that the statute in question was not in force in this Colony inasmuch as the fine imposed thereby for the offence contemplated, is directed "to go to the poor of the parish or place where the offence shall be committed," and as there was no legal poor in this Colony, the judgment of the law could not be carried into effect. The learned Judge doubted the applicability of the statute to this Colony, conceiving that "the poor of the parish or place" had reference to the poor persons maintained by force of the poor laws of *England*, and that consequently was local in its application; but he reserved the question for consideration.

Foster, and *Windeyer*, in support of the objection, contended that the statute was local, and could not be applied to this Colony. The statute enacts that the party convicted "shall be fined five times the value of the sum won or lost; which fine (after such charges as the Court shall judge reasonable, allowed to the prosecutors, and evidence out of the same) shall go to the *poor* of the *parish* or place where such offence shall be committed." The sentence thus imposed by the law

(1) From vol. 5 of Sir James Dowling's MS. notes of select cases, and reported less fully in the *Sydney Gazette*, 18 Aug. and 25 Sept., 1838, and *Australian*, 25 Sept., 1838.

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cannot be executed, inasmuch as there are no poor in this Colony, within the meaning of the statute. The statute means *legal* poor, that is persons maintained by parochial relief, from a fund compulsorily raised upon the inhabitants of the parish. Here there are no poor laws, and no poor in the legal acceptation of the term. The penalty is directed to be paid to persons not in existence, and therefore the statute is inapplicable, and cannot be enforced. This being a penal statute must be strictly construed. However desirable it may be to discourage the vice of gaming, yet until the local Legislature, by virtue of the statute 9 Geo. IV, c. 83, s. 24, shall declare this statute to be in force in, or modify it to meet the circumstances of the Colony, it cannot be carried into effect. The case of *Rex v. Maloney* (2) decided by a majority of this court on 1st February, 1836, is an authority in point, which determined that the English Marriage Act was not in force here, from want of machinery. So in this case there is no machinery to carry out the principle of the law, and it must remain inoperative until adapted by the local Legislature to the actual state of the Colony.

The *Attorney-General (Plunket) and Therry*, in support of the conviction.

The 24th sec. of the New South Wales Act, enacts that all the laws of England shall be applied in the administration of Justice in the Courts of New South Wales *so far as the same can* be applied in the Colony. The question is *can* this Gaming Act be applied to any extent in the Colony so as to put down the vice of gaming? It is not necessary to show that it can be applied in *all* its provisions. This defendant has been legally convicted of winning £80, and the law says he shall pay a fine five times the value of the sum won. As it respects him it is wholly immaterial what becomes of the fine. There is great distinction between the *imposition* and the *appropriation* of the fine. It is not because the fine cannot be applied in the precise manner pointed out by the Statute, that the defendant is to go unpunished. But here the provision of the Statute may be substantially carried into effect, by appropriating it to the Benevolent Asylum of *Parramatta* where the offence was committed. "Poor of the place," does not necessarily mean paupers maintained by compulsory law. These words may be satisfied by showing either that there are any poor persons in the place, or that there are any voluntary charitable institutions established for the relief of the poor where the offence was committed. But even if there are no *poor*, then the consequence must be, that the

(2) *Ante*, p. 74.

fine must be appropriated to the Crown ; or it may go as is provided by the Statute to the prosecutors and witnesses. In *Rex v. Wyatt* (3), which was a conviction under the Statute 5 *Anne* c. 14, which appoints half the penalty to the poor of the parish, where the offence happens to be committed, it was held to be no objection that the offence was alleged to be *apud villam de Mottram Andrews*, for it was said by the Court, that if there be such a parish as *Mottram Andrews*, it shall be intended be coextensive with the *vill* ; but, if the offence was committed in a *vill*, which was extra parochial, then the informer shall have the whole. Here if there be no legal poor, then the penalty may be applied first in paying the prosecutor and witnesses, such reasonable charges as the Court may allow, and the residue may be appropriated by the Crown.

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Foster in reply. The Court can only expound, they cannot make law. Here the law specially appropriates the penalty to a particular fund. If there be no such fund, they cannot appropriate it otherwise without going beyond the law. If there had been no specific mode of appropriation pointed out then the fine must belong to the Crown. The Court would be going out of the Act, if they were to award the penalty in any other manner. If the Court were to adjudge the amount of the penalty, and to award its payment to a different fund from that prescribed by the law, it would be error on the record. A judgment must be good in all its parts. It cannot be good in part and bad in parts. This Act must be capable of being enforced in all its terms or it is inapplicable to the Colony.

Cur. adv. vult.

Judgment was delivered, 22nd September, as follows:—

The CHIEF JUSTICE. I am of opinion that the stat. 18 Geo. II, c. 34, s. 8, is inapplicable to this Colony for want of machinery to carry it into effect. This is a penal and not a remedial statute, and therefore upon the well settled principle respecting such statutes, must be construed most strictly. In carrying the sentence prescribed by the Act into effect, it must appear upon the record to follow the terms of the Act in such manner as to leave no part of the judgment or execution liable to uncertainty. The only difficulty I had at first, was, whether there might not be a distinction between the *imposition* and the *appropriation* of the penalty, and whether we were not at liberty at all events, to impose the penalty, so as to punish the offender, and leave the appropriation of it untouched by our judgment ; but I am now

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satisfied that we could not take that course. The judgment of the law under this Act is an entire thing,—the imposition and the appropriation are not severable, but must form one entire adjudication. The Act directs the amount of the fine, and its mode of appropriation, in a particular manner,—first in allowing such charges as the Court shall judge reasonable to the prosecutors and evidence out of the amount, and secondly in awarding the residue to go to *the poor of the parish or place* where the offence shall be committed. This appropriation should appear with certainty, and particularity on the record or the record of conviction would be void on the face of it. It is a well settled principle that a conviction must be good in all its parts (4); the judgment in particular, being an entire act, cannot be severed, and therefore if it is bad as to part, the whole is thereby vacated, although the several parts may be in their nature distinct. Thus a conviction for not accounting for tolls, and also for not paying over the receipts, being defective as to the latter offence, for not specifying the sums, though correct as to the former was discharged altogether. *R. v. Catherall* (5). In *R. v. Seale* (6), where the stat. 42, Geo. III, c. 119, against illegal lotteries, directing the penalty to be distributed one-third to the informer and one-third to the person apprehending or securing the offender, a conviction directing the penalty to be distributed as the law directs, without ascertaining to whom the last third is to be paid (the person being uncertain) is bad. In adjudicating in this case we are not at liberty to go out of the statute. We must adhere to its terms without deviation. The whole difficulty here arises as to the mode of appropriating the fine as part of the judgment. It is no doubt laid down in *Hawk. P. C.* 62, c. 26, s. 17, and *R. v. Milland* (7) that all fines for offences created by any penal statute, would, if not otherwise appropriated by the Statutes themselves, belong to the Crown. Had this Statute been silent as to the mode of appropriation, then we should have no difficulty; but having expressly appropriated the fine in a particular manner, we are driven to the inquiry, who are meant by the *poor* of the parish or place where the offence was committed? If we were called upon to expound the law in *England*, there is no doubt we should be constrained to hold that parochial paupers maintained out of parish rates, levied by law, and which are distributed and managed by guardians and overseers appointed by the lay payers, were intended. Can we come to any other conclusion sitting here? Are there any other poor of the parish or place where this offence was committed, answering the description contemplated by the law? We must take

(4) *The King v. Salomons*, 1 T. R., 251.

(5) 2 Stra., 900.

(6) 8 East, 568.

(7) 1 Burr., 576.

judicial notice that there are no poor laws in this Colony, and no poor in the legal sense of the word. The mere fact of there being a voluntary association of benevolent subscribers to an institution for affording casual relief to poor or infirm persons, will not satisfy the definition given in the Act; and therefore it appears to me that there is a want of some legislative modification to carry this very salutary law into effect. By the stat. 9 Geo. IV, c. 83, s. 24, the duty is imposed on us of adjudging as to the application of any English laws or statutes to the Colony where any doubts arise thereon, in order to enable the local Legislature to declare whether such laws or statutes shall be deemed to extend to the Colony, or to make such modifications thereof, within the same, as may be deemed expedient in that behalf. Having thus adjudicated in the present case it will be for the local Legislature to determine, whether they will so adopt and modify the Act in question, in such a manner as will carry its highly beneficial principles into operation in this Colony. The authority of the case of *Rex v. Wyatt* (4) cited in argument is very doubtful, for in *Rex v. Priest* (8), it was decided that an award expressly to the poor of a township, where the statute spoke of a parish was irregular. There have been Acts passed in England to regulate the mode of accounting for and paying fines as arise upon convictions before justices, not otherwise provided for. The 3 Geo. IV, c. 46, is a general Act upon this subject, and directs all fines &c. (save and except the same shall by virtue of any Act or Acts of Parliament made, or to be made, be otherwise directed to be levied, recovered, appropriated, or disposed of) shall be disposed of in the particular manner there pointed out. But for the express provision as to the appropriation of the penalty in the present Act, as I said, before, there would have been no difficulty, but from the peculiar terms of it, we are bound to treat it as a local Act, and at present not applicable to New South Wales.

BURTON J. concurred.

WILLIS J. concurred (9).

Conviction arrested.

(8) 6 T. R., 533.

(9) But "doubted," according to the note of the Chief Justice.

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Ex-parte BUCHANAN. (1)

July 12. *Mandamus*—Jurisdiction of Magistrate doubtful—Sydney Building Act, 8 Will. IV, No. 6.

Dowling C. J.
Willis J.
and
Stephen J.

The Sydney Building Act, 8 Will. IV, No. 6, is apparently copied from 14 Geo. III, c. 78, which provides for the inspection of certain buildings by the District Surveyor, "and such surveyor for his trouble thereon, shall be paid by such master-workman, or person causing such building or wall to be built, such sum of money for his trouble therein *as two justices shall, by any writing under their hands, order, not exceeding, &c.,*" "and in default of payment of such sums, *or such other sums as such justices shall appoint,*" the same shall be levied by distress and sale under the warrant of one justice. The local Act omits the words in italics. Although the Court did not decide that the magistrates had no jurisdiction to issue a warrant to recover fees under the Act, but merely that it was a doubtful case, *held*, that the Court ought not to interfere by *mandamus*, to compel the magistrates to act, when by so doing, the latter might be subjected to an action.

The facts in this case appear sufficiently in the judgment of the *Chief Justice*.

July 12.

The CHIEF JUSTICE: This was an application at the instance of Mr. *Buchanan*, Town Surveyor of Sydney, for a writ of *mandamus* to be directed to *H. C. Wilson*, Esq., and two other Justices of the Peace, commanding them to issue their warrant for levying by distress and sale of the goods and chattels of Mr. *W. Nash*, certain rates of payment, claimed to be due to the applicant for his trouble in viewing, and seeing that all the rules and regulations contained in the Sydney Building Act, 8 Wm. IV, No. 6, had been well and truly observed. It appears, as alleged, that Mr. *Nash* had become liable to pay Mr. *Buchanan* certain rates, as Town Surveyor, in the performance of his duty under the Act, and having, upon application refused to pay them, Mr. *Buchanan* resorted to the Bench of Justices in Sydney for a distress warrant under the 56th section to levy the same; but the Justices, doubting their jurisdiction, refused it, and we are now called upon to determine whether this is a case in which the Court will grant a *mandamus*. The local ordinance in question appears to have been framed upon, and almost copied from the London and Westminster Building Act, 14 George III, c. 78, but there is a difference between the 63rd section of that Act, and the corresponding section (56), of the local ordinance, which

(1) *The Sydney Herald*, July 17, 1839.

is, in my opinion, very essential. By the 64th section of the London Act, it is enacted, "that before any building or wall, or new or old foundations, or on foundations partly new and partly old, within the limits of this Act, shall be begun to be built, the master-workman, or person causing such building to be built, shall give twenty-four hours' notice thereof to the surveyor within whose district the same shall be; and such surveyor shall view such building, and see that all regulations are observed, and such surveyor *for his trouble* thereon, shall be paid by such master-workman, or person causing such building or wall to be built, *such sum of money for his trouble therein as two justices shall, by any writing under their hands, order, not exceeding*" (the scale of fees therein set out), "and in default of payment of such sums, *or such other sums as such justices shall appoint*, the same shall, by warrant of one justice be levied by distress and sale of the goods and chattels of such master-workman, or other person, together with the costs of distress." The 56th section of the Local Ordinance is nearly in the same terms, but omitting the important words "*as two justices shall, by any writing under their hands, order*," and also the words "*or such other sums as such justices shall appoint*." By the London Act, it is obvious that a jurisdiction is given to the justices to *hear and determine*, and award by writing under their hands, what sum of money is due to the surveyor for his trouble, according to the rates prescribed, and in default of payment of the sum so adjudicated to be due, or such *other sums* as the justices shall *appoint*, they are authorised to grant a warrant of distress to levy the same. This jurisdiction so given, necessarily imparts the power of summoning the parties before the justices, hearing the complainant, and the defendant, and their witnesses, respectively, and deciding judicially whether anything, and what is due to the surveyor. The justices are not absolutely to award the scale of rates prescribed, but to award a *quantum meruit*, not exceeding that scale, for the *trouble* which the surveyor has had. The extent of his labour and trouble is matter of evidence, and is not left to the mere judgment of the surveyor himself. The jurisdiction thus carved out, is consonant with the principles of natural justice, and the constitutional principle on which every court of justice is founded. "In every Court," as Sir *W. Blackstone* says (3 Com. 25), "there must be at least three constituent parts, the *actor*, *reus*, and *judex*. The *actor*, or plaintiff, who complains of an injury done; the *reus*, or defendant, who is called upon to make satisfaction for it; and the *judex*, or judicial power, which is to examine the truth of the fact, and, if any injury appears to have been done, to ascertain, and, by its officers, to apply the remedy." It is clear that no such jurisdiction is

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given to the Justices by the Sydney Building Act. They have no power of hearing and determining whether the surveyor's claim is just or reasonable. It is sufficient that the surveyor informs them that he had not been paid, and without further inquiry he has a right to demand a warrant of distress and sale. In effect, the Justices are mere instruments in the hands of the surveyor—he is the *judez*, and they his *officers* to apply the remedy pointed out by the Act. It was contended that it was impossible to carry this section of the ordinance into operation without violating common reason, inasmuch as it is contrary to common reason, nay, absurd, that a man should be a judge in his own case. On the other hand it is said, "*ita lex scripta est*," and the Court has no power to depart from it, without usurping the unconstitutional province of legislating. It was agreed, in the words of *Professor Ohristain*, "that if an Act of the Legislature is clearly and unequivocally expressed, it is neither void in its direct nor collateral consequences, however absurd and unreasonable they may appear," but it was admitted, "that if the Act will admit of doubt, it will not then be presumed that that construction can be agreeable to the intention of the Legislature, the consequences of which are unreasonable; but where the signification of a statute is manifest, no authority less than that of Parliament can restrain its operation." Agreeing in this doctrine as I do, and bound as this Court is to pay the like respect to the Acts of the local Legislature when duly passed, in pursuance of the statute by which the local Legislature is erected, as they would the statutes of the Imperial Parliament of Great Britain, still I apprehend it is open to us to put such a construction on its laws as shall not involve unreasonable consequences, which it must be presumed it could never intend. As a general principle, it is repugnant to the law of England, that "a man shall be a judge in his own case." How can we suppose that the Legislature really contemplated such an unreasonable proposition, especially with the London Building Act in its purview, which Act, if it can be construed *in pari materia* with this, shows that the Parliament of England took emphatic care to guard against such unreasonable consequences as would be involved by the local Act. The reasonable presumption is, that in penning an Act of such magnitude, and embracing such a vast variety of complicated provisions, the compiler had omitted by mistake or accident the most vital jurisdiction conferred on the Justices of the London Building Act. It is clear that the Justices of Sydney have not in express terms any power to hear and determine, and I can find no authority which would give them jurisdiction by implication. If we were now to

hold that they had jurisdiction to hear and determine, that would be legislating, not expounding. It is true, as was contended, that where an Act of Parliament enacts any matter or thing, it tacitly gives the right of carrying it into effect by all legal means; and therefore, though the words used are not express to all matters necessary for the purpose, the Court will so construe the statute, that its object may be obtained; but the case put in illustration of that principle does not bear out the proposition contended for in the present case. In that case, *Reg. v. Simpson* (2), the defendant was convicted for deer stealing, under 3 and 4 Will. and Mary, c. 18, and the question was, whether he could be convicted in his absence or in default of appearance, or should have been brought before the Justices before he was convicted. The statute was silent on the subject, and only required the conviction to be on the oath of one credible witness. The Court decided that the conviction was good; for that if he could not be convicted, but on his appearing, the consequence would be, that by refusing or omitting to appear, the statute would be defeated. In that case, there was a Judge, with power to hear and determine, and there was nothing repugnant to law or justice in convicting a man behind his back, if he did not choose to appear and make defence. But here the Justices have no power to hear and determine. If they had, then we should follow up the principle of the case cited, and so construe the Local Ordinance, that its object might be attained. The provision of the Local Ordinance, was likened to the power of distress given by a landlord for recovering his rent. The right of distraining for rent stands upon a very different footing, and however, many enlightened persons have questioned the policy of such a right, it has never been extended to any other relation in the transactions of mankind. The doubt I have, is that the local Legislature really intended to omit the jurisdiction given by the 63rd section of the London Building Act, in copying that into the Sydney Act; and in a case so doubtful, and involving such consequences, in violation of the principles of natural and political justice, I think we ought not to interfere by *mandamus*, which if we did, might subject the Magistrates to an action. It appears to me that they had reasonable ground for doubting their jurisdiction, and on that ground, we ought not to compel them to do an act which may subject them to an action. In *Rex. v. The Justices of Buckinghamshire* (3), *Abbot*, C.J., said—"Since I have had the honour of sitting in this Court, I have always expressed very great reluctance in compelling Magistrates to do anything which might subject them to the chance of an action. In those cases where the duty of the Magistrates is clear

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(2) 10 Mod. Rep., 248.

(3) 1 Barn. & Cres., 437; 2 Dow. & Ry., 689.

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Ex parte that an action may be brought to prevail with us; but when we cannot
 BUCHANAN. see that his duty is plain and obvious, but may be matter of doubt, we
 Douling C.J. do not interpose." In the present case, I shall conclude by saying, in
 the language of the same eminent Judge, "I think we ought not to
 compel the Magistrates to issue their warrant." I forbear saying any-
 thing more than that I entertain doubt upon the question. I do not
 wish to prejudge a question which may hereafter be considered, should
 any other Magistrates be found who shall issue their warrant, and
 thereby raise the point for discussion. When such a question shall be
 raised, it will be the duty of the Court to hear it discussed, and decide
 upon it. At present, I wish to be understood as giving no judicial
 opinion upon it, and that the ground on which I discharge this rule is,
 that I cannot myself clearly see that these Magistrates may not be
 subjected to an action if they should issue their warrant.

WILLIS, J. said, that when the application was first made he was
 disposed in favour of the *mandamus*, but upon consideration, and
 especially after hearing the judgment of the *Chief Justice*, he was of a
 different opinion. The reason why he first thought the *mandamus*
 should issue was, that the Magistrates having the power of issuing
 execution, it necessarily implied that they had the power of taking the
 previous steps, the major power necessarily including the minor, but
 upon consideration he thought that the necessary power was not given.
 It is quite clear that if the Magistrates had the power of conviction
 given them, and the Act stopped there, that they could not issue
 execution. It is a rule always followed not to issue a *mandamus*
 wherever the matter is in the least doubtful, and therefore he agreed
 with the Chief Justice that the *mandamus* should not issue.

STEPHEN, J. thought that the London Building Act itself is deficient,
 but there the Magistrates have the power of awarding what sum is to
 be paid to the surveyor. He agreed with his learned seniors.

Rule discharged.

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July 11.

Dowling, C.J.

Libel—Certificate for costs—Verdict under 40s.—43 Eliz., cap. 6.

The plaintiff in an action for libel having recovered one farthing damages, the defendant applied to the presiding Judge to certify to deprive the plaintiff of costs under 43 Eliz., cap. 6.

Held, the Court had no power to grant such certificate.

In this case, which was an action for a libel contained in a newspaper, the jury returned a verdict for the plaintiff, damages one farthing. Counsel for the defendant asked the *Chief Justice*, who presided, to certify to refuse the plaintiff his costs. Judgment on this point was reserved.

The CHIEF JUSTICE (2). This was an action for libel, and the Jury found a verdict for the plaintiff, with one farthing damages. The case was tried before me, and an application was made for a certificate under the statute 43 Eliz. c. 6 to restrain the plaintiff from recovering greater costs than the amount of the damages. Not remembering any instance of there being any case in which such a certificate was ever granted under that Statute in an action on the case for libel, and my general impression being that such a certificate could not be granted under that Statute, I doubted my power and reserved the point for consideration. I am now of opinion that I have no power to grant such a certificate. It is true that this is a personal action but in order to determine whether this is one of the personal actions contemplated by the Statute, recourse must be had to the declared object of the Statute. The title is "An Act to avoid trifling and frivolous suits at law, in Her Majesty's Courts at Westminster"; and the preamble states that it was passed, "for avoiding the infinite number of small and trifling suits commenced or prosecuted in the Courts at Westminster, which by the due course of the laws of this realm ought to be determined in the inferior Courts of the country, to the intolerable vexation and charge of Her Highness' subjects"; and then by cap. 4 it enacts that, "if upon any action personal brought in any of Her Majesty's Courts of Westminster, *not being for any title or interest of land, nor concerning the freehold or inheritance of any lands,*

(1) *The Australian*, July 13 and 16, 1839; *The Sydney Herald*, July 19, 1839.

(2) *The Sydney Herald*, July 19, 1839; Sir James Dowling's *Select Cases*, v. 174.

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nor for any battery, it shall appear to the Judges of the same Court, or so signified or set down by the Justices before whom the same shall be tried, that the debt or damages to be recovered therein in the same Court, shall not amount to the sum of 40s. or above, that in every such case the Judges or Justices, before whom such action shall be pursued, shall not award the plaintiff any more or greater costs than the sum of the debt or damages so recovered shall amount unto, but less at their discretion. There is no doubt that the avowed object of the Legislature in passing that Statute was to confine all personal actions of small value, not being for any title of land, nor for any battery, to the Courts Baron, and other Inferior Courts in the country, and prevent litigation by litigious plaintiffs. No instance of a certificate upon the Statute is to be met with in the books earlier than the middle of the reign of George the Second; until that time certificates were uniformly refused; the reasons for such refusal being perhaps because that as causes were injudiciously tried in inferior jurisdictions in the country, the Courts of Westminster Hall would not so far prevent a plaintiff prosecuting therein as to deprive him of his costs by certifying under the Statute. Almost all the decisions upon the Statute have reference to actions for injuries to the person, or injuries to personal or real property. I can find no instance of a certificate being granted in an action for libel, and after some experience of the Courts at home, I may venture to say that such a case never occurred. It has been my lot to try many actions for libel in this Court, in some of which the damages recovered were under 40s., and no application for such a certificate has ever been made, notwithstanding the very natural repugnance to pay costs, which often forms the most grievous visitation upon an unsuccessful suitor. This may be regarded as a practical interpretation of the Statutes adverse to the power now sought to vest the Judges with, and looking at the obvious intention of the Statute, I cannot say that an action for libel is one "which by the due course of the laws of this realm ought to be determined in any inferior Court of the Colony," however intolerable or vexatious one of the parties to the record may regard such an action. The only inferior Court in this Colony that could take cognizance of such an action is the Court of Requests, and then only where the damages were laid at £10, and probably neither party, however upright or learned the Commissioner of that Court may be, would choose to submit the case to his decision without the intervention of a jury. I think the necessity for passing the Statute 21 Jas. I, c. 16, s. 6, is a strong commentary to show that an action for a libel was not contemplated by the Legislature in passing the 43rd Elizabeth. The

action for verbal slander is *personal*, and if such an action were within the operation of the Statute of Elizabeth, there would have been no occasion for enacting by the 21 Jac. I, "that in all actions upon the case for *slandorous words*, to be used or prosecuted by any person or persons in any one of the Courts of Record at Westminster, or in any Court whatsoever that hath power to hold plea of the same, if the Jury upon trial of the issue in such action, or the Jury that shall enquire of the damages, do find or assess the damages under 40s., then the plaintiff or plaintiffs in such action shall have and recover only so much costs as the damages so given or assessed shall amount unto, without further increase of the same, any law, statute, custom, or usage to the contrary in any wise notwithstanding." Now, it has been adjudged in the case of *Greaves v. Warner*, B.R.T., 24 George III, cited in *Hullock, Costs*, p. 8, and in *Tidd*, p. 997, that this Statute in its operation is confined to actions for *slandorous words spoken of the person*, and does not extend to an action for libel; therefore, if the plaintiff upon the execution of any writ of enquiry after judgment by default in an action for libel, obtain only one shilling damages, he will be entitled to full costs. On full consideration, however desirable it may be to vest the presiding Judge with the power of depriving a party of his costs in a case of this description, I am bound to decide that I have no such power, and consequently abstain from intimating what my opinion would have been had I been in a situation to exercise it.

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Application refused.

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REGINA v. RUSSELL. (1)

Sept. 16.

Dowling C. J.
Willis J.
and
Stephen J.

*Mutilation of dead body—Criminal misdemeanor—Act contra bonos mores—
Coroner.*

The defendant, not being a duly qualified medical practitioner, dissected and removed parts of the body of a deceased person, with the intent, according to the information, of preventing due inquiry into the cause of death. This act is a criminal misdemeanour, as tending to defeat the object of the Coroner's inquest, and being *contra bonos mores*. The defendant having demurred to the whole of the information, was held to have admitted all the facts stated therein, and to be estopped by the record from affirming that there was no legally appointed Coroner for Sydney.

DEMURRED to a criminal information. The counts of this information are set out in the judgment of the *Chief Justice*.

THE CHIEF JUSTICE. This was an information filed by the Attorney-General against the defendant for a misdemeanour. There were five counts. The first stated, that on the 5th April, 1839, one *James M'Intosh* died a sudden death, at Sydney, and that his body laid dead, and that according to the laws of the Colony in such cases, an inquisition is had and taken on the view of the body by and before one of the Coroners of the Queen and a Jury in that behalf, and that such inquisition ought to be had and taken on view of the said body, in order that it might be inquired into and found whether the sudden death was caused by violent means or from natural causes or otherwise, and that the same might be found by verdict and return of the said Coroner and Jury. That the defendant, a Surgeon, well knowing the premises, did unlawfully, &c., cut open the head of the body of the deceased, and removed and took away from and out of the said head, the brains thereof, in order and for the purpose that the cause of the sudden death of the deceased might not be found and ascertained as aforesaid, and thereby to frustrate the ends of public justice, in contempt of the laws, &c. The second count stated that deceased had suddenly died, and that defendant being an evil-disposed person, and not having regard for the religion, laws, &c., whilst the body laid dead, contrary to decency, good morals, and religion, and in contempt of the laws, &c., did without any reason or necessity, wantonly, indecently, unlawfully, and contemptuously cut open and dissect part

(1) *The Sydney Herald*, Sept. 18, 1839, and the *Sydney Gazette*, Sept. 19, 1839.

of the body of the deceased so lying dead, to the great scandal, &c., of religion, in contempt, &c. The third count stated that whilst the said body laid dead, the defendant, without any authority, almost immediately after life departed, and whilst the body of deceased so lying dead was still warm, did cut open, dissect, and mutilate the body of the deceased so lying dead, to the grievous affliction of the relatives and friends of the deceased, in contempt of the laws, &c. The fourth count stated that, at the time of deceased lay dead as aforesaid, one *John Ryan Brennan*, Esq., was the Coroner for the Queen, acting as such Coroner for the district of Sydney, in the Colony aforesaid, and that defendant being an inhabitant of the district of Sydney, and having notice of the premises, and not regarding his duty in that behalf, did not at any time send or give notice to or for the said *J. R. Brennan*, or to or for any Coroner of the Queen for the said district of Sydney, or any Coroner of the Colony, to view the body of the deceased, but unlawfully, &c., omitted and neglected so to do, and unlawfully, &c., did cut open and dissect the head of the body of the deceased, and removed the brains from and out of the head of the said body, and cut open and dismembered the said body, without and before any view being had of the said body by the said *J. R. Brennan*, or any Coroner of the Queen for the said district, and before any inquisition being had and taken on the view of the body of the deceased, as by law required in that behalf, to the great hindrance of justice, in contempt of the Queen and her laws, &c. The fifth count stated that the defendant, not being a legally qualified medical practitioner, in pursuance of the local ordinance passed on the 12th October, 1888, entitled "An Act to define the qualifications of medical witnesses at Coroners' inquests," &c., and well knowing the premises, and contriving and intending to prevent a legally qualified medical practitioner from giving full and sufficient evidence at and upon the holding of an inquest on view of the body of the deceased so lying dead as aforesaid, of the cause or probable cause of the sudden death of the deceased, did on, &c., unlawfully, &c., dissect and mutilate the body of the deceased, and did unlawfully, &c., cut open the head of the body of the deceased, and take and carry away the brains from and out of the head of the same body, with an unlawful and wicked intention, to pervert the due course of justice, in contempt, &c. To this information there was a general demurrer, and the question is, whether there is sufficient on the face of the record to warrant the Court in giving judgment against the defendant as for a misdemeanour. In the course taken by the defendant he admits the facts stated in the information, and contends that admitting the facts so alleged against

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him to be true, they do not constitute any offence punishable by law. It is clear that if any one count in the information be good, the Court may proceed to pronounce judgment and award sentence, without the intervention of a Jury upon the merits. By demurring the defendant has concluded himself upon the facts, instead of going before a Jury and offering any matter of defence excusatory of his conduct or demonstrative of his innocence of the matter charged. Had he been found guilty by a Jury the objections taken on demurrer were equally open to him in arrest of judgment. Having therefore closed the door of inquiry by the country, and declined taking the chance of an acquittal, we are now to determine the case as it appears upon the record. The facts admitted by the demurrer to the different counts, respectively, are these:—First, that *M^r Intosh* had died a sudden death, and that by the law of the Colony it was requisite that an inquest should be holden on the body, before a Coroner and Jury, in order to ascertain the cause of the death, and that the defendant knowing the premises, cut open the head of the body and removed the brains therefrom, in order and for the purpose that the cause of the sudden death might not be ascertained, and thereby to frustrate the ends of public justice. Secondly, that without any reason or necessity he cut open and dissected part of the body of the deceased. Thirdly, that without any authority, and almost immediately after life had departed, and whilst the body was still warm, he did cut open, dissect, and mutilate the body of the deceased. Thirdly, that knowing *J. B. Brennan, Esq.*, to be the Coroner for Sydney, and acting as such, and defendant being an inhabitant thereof, contrary to his duty as such, did not give notice to the said Coroner of the death of the deceased, that an inquest might be held on the body, but on the contrary thereof, and before any view had been had of the body by the said Coroner, he did cut open and dissect the head of the body of the deceased, and removed the brains from and out of the head of the body, and cut open and dismembered the body, to the great hindrance of justice. Fifthly, that being an unqualified medical practitioner, according to the law of the Colony, and intending to prevent a legally qualified medical practitioner from giving full and sufficient evidence at an inquest upon the body of the deceased as to the cause of death, he dissected and mutilated the body, and cut open the head thereof, and took and carried away the brains from and out of the head, with intent to pervert the due course of justice. Upon these facts, admitted by the demurrer, it was contended, first, that those counts which mentioned a Coroner, either generally or by name, were bad, because there was no legally-appointed Coroner for Sydney or any other part of the Colony, and

that consequently the whole matter charged by these counts to be criminal had no basis to support them ; and secondly, admitting this objection to be tenable, there was nothing imputed to the defendant in the other counts which amounted to a crime, however offensive it might be to good taste or propriety. I am of opinion, that in the way in which this case is presented to the Court, we are not at liberty to consider the question, as to the mode of appointing Coroners in New South Wales. The demurrer does not raise that question, if any doubt could be entertained upon it. The defendant is estopped by the record on this point, for he must be taken to have admitted that by the law of the Colony an inquest must have been had upon the body in question, and that at the time the body laid dead, *J. R. Brennan, Esq.*, was the Queen's Coroner, acting as such for the district of Sydney. In the absence of all proof to the contrary, we are, for the purposes of this case, bound to presume that the Coroner was lawfully appointed by Her Majesty, and that it is not now open to the defendant, after demurrer, to dispute the validity of his appointment. Could such a question have been raised, the mode of appointment must have been matter of proof before a Jury, and if the question were disputable, the point might be determined on special verdict. The defendant has, however, concluded himself from disputing this part of the case, by admitting on the record, that there is such an officer in existence in the Colony, and that by the law of the Colony an inquest on a dead body must be holden by and before such an officer. We can look to the record only, and see whether there is a sufficient *constat* of facts aptly charged to warrant us in giving judgment upon it. Here we have the fact admitted, that at the time this body laid dead, there was a Coroner of the Queen for Sydney acting as such in the district where the sudden death occurred. I do not therefore think it necessary to enter into any consideration of the very ingenious argument addressed to us on this part of the case, it being no part of the duty of this Court to decide points not necessarily involved in a case submitted for judgment. It being admitted that there is in fact a Coroner for the district where this sudden death happened, having cognizance by law of sudden deaths, within his jurisdiction, the only question now is, whether the conduct imputed to the defendant, in all or any of the Courts, is criminal in the eye of the law. I agree that giving hard names to an act, innocent in itself, will not make it criminal. The terms wicked, contemptuous, pernicious, wanton, indecent, scandalous, disgraceful, and irreligious (expletives, pregnant of great pungency), would not, I admit, give any deeper colour to the transaction charged as criminal, unless it were really

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1839. criminal in the eye of the law. But is the act imputed to the defendant innocent as it appears on this record? By the Statute *de officio coronatoris* 4 Edw. I, St. 2, which was passed in affirmance of the common law, the Coroner, upon information, shall go to the place where any be slain or suddenly dead or wounded, and forthwith summon a jury to inquire into the circumstances attending and the cause of the death, and the jury must view the body. Although the Statute alluded to does not say expressly that the Coroner shall take his inquest on view of the dead body, yet it is clearly laid down by all the books, that an inquest of death can be taken by a Coroner *super visum corporis* only, and if there be no view the inquisition is void. This is an essential part of the duty of the Coroner, to the intent of making due enquiry as to the cause of the death for the purposes of public justice. In truth the body itself is part of the evidence before the Jury, and if they see it before, and not after, they are sworn, a material part of the evidence is given when the Jury are not upon oath. It is essential then, for the ends of justice, that the inquest should have the dead as well as the living witnesses untampered with before them, in order to enable them to arrive at a just conclusion. This being the law, has the defendant been guilty of any criminal infraction of it? It is charged in the various counts, that the defendant cut open the head of the body and removed the brains, in order and for the purpose that the cause of the sudden death might not be ascertained, and thereby to frustrate the ends of justice,—that without any reason or necessity he did so;—that without any authority and almost immediately after life had departed, and whilst the body was still warm he did so;—that knowing of the sudden death, and that *J. R. Brennan*, Esq., was the Coroner, he, contrary to his duty, before any inquest was held cut open the head, to the great hindrance of justice,—and that being an unqualified person by the law of the Colony, and to prevent due enquiry into the cause of the death, he cut open the head with intent to prevent the due course of justice. Regarding these allegations as now indisputable, I have no hesitation in holding this to be a criminal misdemeanor. The act imputed, tended to defeat the very object of the Coroner's inquest. How could the Jury upon view of the mutilated body determine the cause of death? It is an offence at law to tamper with a living witness, prior to an ordinary trial, and surely it is no less so to practice upon the most important witness upon so solemn an inquiry as an inquest *super visum corporis*. The view of the body is often the most important and material proof before the Jury. The body, in such cases, often speaks more eloquently and convincingly for itself than the most consistent oral testimony. The

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silence of death is more impressive than the vocal testimony of living witnesses. The gravamen of the defendant's offence is, that without reason, or necessity, and without authority, and being an unqualified person, he did this act, in order to prevent due inquiry into the cause of the death, and for the purpose of hindering public justice. This I hold to be a high misdemeanor. It was competent for the defendant to have proved before a Jury, if he could, that he was the medical attendant of the deceased before his death, and that he had the authority of his relatives to open the head, either for their satisfaction or for purposes of medical science, or that there was some cogent reason or necessity for opening the head, extracting the brains, and carrying them away. By demurring to the information he has shut himself out from these grounds of defence, and taking the facts in the marked manner in which they are alleged, I cannot hesitate to pronounce this a criminal act at common law. Whether it was contrary to religion, we are not called upon to decide, but there can be no doubt that the wanton, unnecessary, and unauthorised, mutilation of a dead body, whether for idle curiosity or otherwise, is an offence. Doubtless the interests of science ought to be promoted by all legitimate means. The welfare and the happiness of the living are involved in an anatomical knowledge of the human frame. However shocking it may be to popular prejudices, dissection is necessary and often indispensable, for the advancement of the sciences of surgery and medicine, by which the alleviation of human misery and the prolongation of human life are deeply concerned, and I should be sorry to give encouragement, in this enlightened age, to any popular feeling upon such a subject. It is the manner and circumstances of this transaction, which constitute its offensive character. Here the act of mutilation stands on the record to have been wanton, unnecessary, and unauthorised. Such an act is criminal, as being *contra bonos mores*. It was on this principle that it was determined to be an indictable offence to take up a dead body even for the purpose of dissection, *Rex v. Lynn* (2), the Court holding "that common decency required that the practice should be put a stop to; that the offence was cognizable in a criminal court, as being highly indecent, and *contra bonos mores*, at the bare idea of which nature revolted, and that the purpose of taking up the body for dissection did not make it less an indictable offence." If it be criminal to take up a dead body after burial, for the apparently innocent purpose of dissection, I cannot think it less criminal to dissect it before burial, without any reason, necessity, or authority assigned; with this additional

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1839. ingredient, that it is done for the purpose and with the intent to hinder
REGINA public justice. In this information it is alleged, that the defendant
" took and carried away the brains from and out of the head of the
RUSSELL. deceased. If this has the effect of defeating the enquiry as to the
Dowling C.J. cause of the death, it would be no more effective for that purpose,
than if he had taken away the body altogether, which it will not
be disputed would be a criminal act, if unauthorised by competent
authority. On the whole of this case, I am of opinion that the
information is good in law, and that we are bound to award judgment
and sentence upon the defendant.

WILLIS, J. AND STEPHEN, J. concurred.

*Sentence to pay a fine of £50 to the Queen was then passed on the
defendant.*

[EXCHEQUER JURISDICTION.]

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Oct. 12.

REGINA v. O'CONNELL. (1)

Dowling C.J.
 Willis J.
 and
 Stephen J.

Ejectment—Prerogative of the Crown.

The Court will grant an injunction to restrain the prosecution of an action of ejectment in regard to land which is in the possession of the Crown.

THE defendant in this matter had commenced several ejectment actions against various persons, who occupied lands at Parramatta, as bailiffs of the Crown, to wit, *Thomas Bell*, the Superintendent of the Factory, *John Williams*, a constable stationed at the Domain gate, the *Rev. J. Troughton*, residing in the King's School, and others. It was stated that the defendant, *Sir M. O'Connell* had been constituted agent of Governor *Bligh*, to whom the land had been granted by Governor *King* in 1806, and that the Governor of the Colony had cancelled the grant in 1819 and had taken possession of the land. On the 12th Oct. the Attorney-General resumed his application, on behalf of the Crown, postponed from the 21st Sept., for an injunction to restrain the defendant from proceeding with the said actions on the ground, that the occupiers of the lands in question were bailiffs of the Crown.

Manning contra (Darvall with him). If the application is granted the defendant will be entirely without remedy. The Crown having once granted the land cannot resume possession except by matter of record. *Magna Charta* expressly states that no man shall be disseized of his land by the Crown, except by the judgment of his equals or the law of the land. If the Court holds that the Crown is in possession, I am aware of the principle that the Crown cannot be ousted by ejectment, but there is also another principle, that the subject can undergo no wrong, for which there is no corresponding remedy.

THE COURT (without calling on the *Attorney-General*) granted the injunction on the ground that the land is actually in possession of the Queen by Her Representative the Governor and his bailiffs.

(1) *The Sydney Herald*, October 14, 1839.

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FITZGERALD v. LUCK. (1)

Oct. 12.
Dowling C.J.
Willis J.
and
Stephen J.

Market overt—Stolen property—Right of owner to recover possession—Liability of vendor—Caveat emptor—Warranty of title—Failure of consideration—Public policy.

The plaintiff purchased a horse from the defendant, which was afterwards claimed by a person from whom it had been stolen, and to whom possession was awarded by a Magistrate's order. The plaintiff recovered damages from the defendant, and on a motion to enter a verdict for the defendant, *held*,

A sale by public auction at a place not authoritatively appointed by law for publicly buying and selling is not a *Market overt*. The doctrine of *Market overt* may be applicable to this Colony when public markets are established, but a sale even in *market overt* of this particular species of property will not change the property unless the directions of the Statutes 2 *Phillip and Mary*, cap. 7, and 31 *Eliz.*, c. 12, be observed.

The owner was entitled to recover possession of the horse without prosecuting the thief to conviction.

The vendor guarantees that the vendee shall have undisturbed possession of the thing bought. This is a warranty of *title*, not of *quality*, and the maxim *careat emptor* does not apply. Apart from authority, the verdict should be upheld on the ground of public policy. *Early v. Garrett* (2) and *Springwell v. Allen* (3) distinguished. *M'Lucas v. Hunt* (4) followed.

MOTION to enter a verdict for the defendant. This was an action of special assumpsit for falsely warranting the defendant's title to a horse sold and delivered by him to the plaintiff at the price of £30, with the common counts. Plea, *non-assumpsit*. At the trial, before Stephen, J., and assessors, on September 25, 1839, it appeared in evidence that the defendant sold the horse in question to the plaintiff in May, 1837, at the price of £30, and gave him a bought and sold note without any warranty or affirmation of title. The plaintiff lost the horse shortly after the sale, and in August following, being found in the possession of a Mr. Suttor, of Bathurst, it was claimed by a Mr. Edward Cox as his property, having been stolen from him two years before. Mr. Cox went before the Police Magistrate at Bathurst and swore to the horse, and the Magistrate ordered it to be delivered up to him, he giving a bond to produce the horse again when called upon for the purposes of justice. Several attempts had been made by Mr. Cox to discover the thief by tracing the horse through the hands of several possessors, but without success. The defendant had become

(1) *The Sydney Herald*, October 18, 1839.

(2) 9 B. and C., 928.

(3) 2 East 448 (a).

(4) April 7, 1834.

possessed of the horse by a sale at public auction at Bathurst; the animal had been seized and sold under the Licensing Act as being employed to carry spirits about the country for the purpose of being illegally retailed. There was no proof of any public market or fair being held at Bathurst. The defendant contended that the action was not maintainable without express warranty or affirmation of title, and that the sale by public auction, by order of the Magistrate, must be regarded as a sale in *Market overt*. The plaintiff relied on failure of consideration. A verdict having been entered for the plaintiff with leave reserved, *etc.*, the Court was moved to enter a verdict for the defendant, and on October 12 the judgment of the Court was delivered by—

The CHIEF JUSTICE: We are of opinion that this action is maintainable, and that the verdict entered for the plaintiff must stand. Three propositions were sought to be established on the part of the defendant. First, that the sale by auction to the defendant under the orders of the magistrates at Bathurst amounted in law to a sale in *Market overt*, so as absolutely to change the right of property in the absence of any proof of knowledge in the defendant that the horse was stolen, or any other indication of fraud. Secondly, that supposing this not to be a sale in *Market overt*, yet Cox could not claim the horse without prosecuting the supposed thief to conviction. And, thirdly, that at all events this action could not be maintained without an express warranty or affirmation of title in the horse or proof of a guilty knowledge that the defendant had no title in the animal. As to the first point I think it cannot be maintained that a sale by public auction at a place not authoritatively appointed by law for publicly buying and selling, is a *Market overt*. It is not found as a fact in this case, that this sale took place in an open public market-place. It was simply a sale by auction, but with what notoriety or advertisement previously to the sale does not appear. But six persons seem to have been in attendance at the auction. It has been holden by this Court that a sale in *Market overt* has a legal technical meaning even in this Colony. In *M'Lucas and another v. Hunt*, tried on the 7th April, 1834, the plaintiff bought cattle at a fair value openly and publicly in the day time in the yard of an Inn at Parramatta, of a man named *Young* (many persons being present), and resold them to the defendant who paid the plaintiff partly in cash and partly by his promissory note. Before the promissory note became due it was discovered that the cattle were stolen by *Young* (who was afterwards brought to justice), and the plaintiff having brought his action against the defendant upon the note, it was contended that the sale in the

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Inn yard was, under the circumstances, in this Colony (where we have at present no public fairs or open cattle markets in country places), tantamount to a sale in *Market overt*, but after solemn argument Chief Justice *Forbes*, Mr. Justice *Burton* and myself held that in this court we are bound to give a legal technical meaning to "a sale in *Market overt*," and that as the right of property was not changed by such a sale as was proved, the plaintiff could not recover. If we were to hold that a sale by public auction, however notorious in a place appointed by the vendor himself, or by any other person amounted in law to a sale in *Market overt*, it is scarcely necessary to point out the evil consequences which might result in this Colony. Such a mode of sale might afford a ready mode of disposing of stolen property without the knowledge of the true owners. Such a sale has none of the well-known incidents of a sale in *Market overt*; one of which is that it shall be in a public open place duly appointed for that purpose by public authority, to which all persons may have recourse. The sale here may have been by the orders of the magistrates, and the defendant may have been an innocent purchaser, yet we have no authority for treating such a sale as a sale in *Market overt*. Whenever we shall have public markets established in the country places of this Colony it is probable that the doctrine contended for may become applicable to similar transactions, but in the present case there is no basis for the argument which has been addressed to us. But with respect to this particular species of property, the sale even in *Market overt* would not change the property unless the directions of the statutes 2 Phillip and Mary, cap. 7, and 31st Elizabeth, cap. 12, had been observed, the requisites of which it is not now necessary to recapitulate. Then, secondly it appears to us that Cox the true owner of this horse had done all that was incumbent on him to establish his claim to the animal. He went before the magistrates and swore to the property, endeavoured to trace the thief through several persons who had had possession of the animal, and caused summonses to issue to such persons, and finally upon giving bond to produce the animal, when called upon, for purposes of justice, the magistrates ordered it to be delivered to him. Until the contrary was shown the original right of property remained unchanged. Then as the right of property was not changed the case resolves itself into the third proposition, namely, whether the action could be maintained upon an *implied* without an *express warranty* or affirmation of title, or without proof of knowledge of infirmity of title. No doubt both parties to this transaction as far as appears to the contrary, are equally innocent, but one of them must be the sufferer. The defendant, in fact, held himself out as the apparent owner of the horse, and on that

footing the plaintiff dealt with and paid him the purchase money. *Prima facie* it would seem a principle of common justice without any authority that if a vendor assumes to be owner of a chattel having possession of it, and parts with it to another for a valuable consideration, he impliedly guarantees to the vendee that he had a lawful right to dispose of the property in the chattel. But there are numerous decisions establishing the principle that every vendor of personalty, impliedly warrants that he has a title enabling him to sell it. In *Blackstone's Commentaries*, page 451, it is laid down that, "By the civil law an implied warranty was annexed to every sale in respect to the title of the vendor, and so too in our law a purchaser of goods and chattels may have a satisfaction from the seller if he sells them as his own, and the title proves deficient without express warranty for that purpose." This doctrine was never doubted until the dictum of Mr. Justice *Littledale* in *Earley v. Garnet* (5), but upon referring to the authority on which that dictum is based, it will be found that it does not bear upon the present case. The dictum reported is, "It has been held that where a man sells a horse as his own, when in truth it is the horse of another, the purchaser cannot maintain an action against the seller unless he can show that the seller *knew* it to be the horse of the other at the time of the sale. The *scienter* or fraud being the gist of the action where there is no warranty, for there the party takes upon himself the knowledge to the aid of his qualities." For this see *Springwell and Allen*, 2 *East*, 448, but that case is very distinguishable from the present. That was an action on the case for selling a horse as the defendant's own, when in truth it was the horse of another person, and upon not guilty pleaded, it appeared that the defendant bought the horse in Smithfield, that is in *Market overt*, but did not take care to have him legally tolled; but it was held that as the plaintiff could not prove that the defendant knew it to be the horse of the other person, the plaintiff must be nonsuited, for the *scienter* or fraud is the gist of the action where there is no warranty; for "there the party takes upon himself the knowledge of the title to his horse and his qualities." The principle in the dictum of Mr. Justice *Littledale* is only an echo of that case, but omitting the important facts that the action was in *tort* and not *assumpsit*, and that the defendant had bought in *Market overt*. The present is an action of *assumpsit* against a vendor who did not buy in *Market overt*, but who assumes to be the owner, parts with the horse as owner, and receives the purchase money from the plaintiff upon the faith that he is owner, and as it has turned out that he really had

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1839. no title to the horse, the consideration has failed, and we think there
 FITZGERALD can be no doubt that the plaintiff has a right to recover back his
 v. money. The two cases are obviously distinguishable. To hold that
 LUCK. this action does not lie would be a violation of the first principles of
 Dowling C.J. justice and would go to destroy all confidence between man and man.
 The essence of a contract of this kind is its mutuality. The defendant
 sells as true owner, and the plaintiff gives his money on that footing.
 If it turns out that he is not the true owner, surely the plaintiff
 has a right to have his money back, unless he knows the defendant's
 infirmity of title. It is an implication of law, and of common sense,
 that if *A* sells to *B* for valuable consideration, *A* guarantees that *B*
 shall have undisturbed possession of the thing bought. This is a
 warranty of *title* not of quality, which makes all the difference, and
 it is impossible to apply the maxim *caveat emptor* to such a transac-
 tion. Here the defendant never had any title to sell, although he
 supposed he had, for the right of property in *Cox* has never changed.
 Had the defendant bought the horse in *Market overt* then the dictum
 of Mr. Justice *Littledale* might have applied, and the case of *Spring-*
well v. Allen (6) would have been in point, for then the plaintiff, if he
 had brought an action in case must have shown that the defendant
 knew that the horse was stolen, before he could recover back his
 money. As was well put in argument, suppose the plaintiff had not
 paid for the horse, but in the meantime *Cox* had claimed and got
 possession of it as rightful owner, could it be contended that in that
 case the defendant could have maintained an action against the plain-
 tiff for the price? I apprehend not. This point was decided by this
 Court in *McLucas v. Hunt*, 7th April, 1834, which was an action upon
 a promissory note given by the vendee of stolen cattle to the plaintiff,
 an innocent vendor, and before the note became due it was discovered
 that the cattle was stolen, and it was held that as the consideration
 failed the action was not maintainable. If, however, there were no
 express authority for holding this action maintainable, on an implied
 warranty of title in property of this description, on grounds of public
 policy—that it will have a salutary effect in repressing horse and cattle
 stealing by causing such property to be traced to the offenders and
 thus bring them to justice—on that ground alone, if there were no
 other, we should be of opinion that the verdict for the plaintiff ought
 not to be disturbed.

Verdict for the Plaintiff affirmed.

Ex parte NICHOLS. (1)

Applicability of English statutes subsequent to 9 Geo. IV, c. 83—Right of audience before Justices of professional advocates—Prisoners' Counsel Bill, 6 and 7 Will. IV, c. 114—9 Geo. IV, c. 83, secs. 21 and 24.

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The right to make rules of practice for Courts of Quarter Sessions is vested in the Governor, by sec. 19 of 9 Geo. IV, c. 83.

The case of *Collier v. Hicks* (2), which decided that "no person has by law any right to act as an advocate on the trial of any information before Justices of the Peace, without their permission," although since the statute of 9 Geo. IV, c. 83 was binding on the Court.

That decision has been virtually overruled by the English Parliament, which has declared and enacted a different exposition of the law of England, upon a fundamental principle in the mode of administering justice, (3) and is longer binding on the Court.

There is nothing in sec. 24 of the *New South Wales* Act (4) to restrain the Courts of the Colony from applying here any English statute, affecting the fundamental personal rights of British subjects, whether in force in England subsequently or prior to July 28, 1828 (5).

The Prisoners' Counsel Act is in force in this Colony so far as its provisions can be applied. (*Per the Chief Justice and Willis, J., Stephen, J. dissentiente.*)

(*Per Stephen J.*) Statutes passed in England since the settlement of a Colony do not extend there, unless by express terms or unavoidable construction.

The Prisoners' Counsel Act, sec. 2, is however, declaratory of the law, and a legislative recognition of the principle, erroneously overruled by *Collier v. Hicks*.

MANDAMUS.

This was an application for a writ of *mandamus* to be directed to *H. C. Antill, Esq.*, one of Her Majesty's Justices of the Peace, in the district of Stonequarry, commanding him to allow *Mr. G. R. Nichols*, one of the attorneys of the Court, to conduct the defence of one *Charles Morris*, on the ground that the Magistrate had refused to allow *Mr. Nichols* to conduct the defence, but had adjourned the case until the opinion of the Court could be taken on the point. The case was argued on October 26, by Messrs. *a'Beckett* and *Windeyer*, for the applicant, and the *Attorney-General* and *Mr. Purefoy* for the magistrate.

Judgment was delivered on October 28.

(1) *Sydney Herald*, Oct. 30, Nov. 1 and 13, 1839.

(2) 2 Barn. and Ad., 663, 1831.

(3) The Prisoners' Counsel Act, 6 and 7 Will. IV, c. 114, sec. 2, provides "That in all cases of such conviction persons accused shall be allowed to make their full answer and defence, and to have all witnesses examined and cross-examined by counsel, &c."

(4) 9 Geo. IV, c., 83.

(5) The date of the N.S.W. Act.

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The CHIEF JUSTICE. The question involved in this proceeding is one of considerable public importance. It is admitted that had the Act of the Imperial Parliament, 6 and 7 Wm. IV, c. 114, entitled "An Act for enabling persons indicted for felony to make their defence by Counsel or Attorney," been adopted by the Legislature of this Colony, no doubt could have been entertained on the question. It is matter of history that by a despatch from Lord *Glenelg*, the Secretary of State, dated 5th of September, 1836, addressed to Sir *Richard Bourke*, that Governor was desired to take measures for extending to the Colony under his Government the provisions of that statute. This requisition (which manifests, at all events, the imperative sense of Her Majesty's Government of the applicability of the Act to this Colony), would have been complied with, and a bill was, in fact, brought before the Legislative Council, in 1837, with that object, but from considerations quite distinct from the abstract propriety extending the law to this Colony, it was deemed expedient to postpone its adoption until Circuit Courts should be established. It is also a matter of history that this law has been adopted by the Legislature of Van Dieman's Land, and is now in full and satisfactory operation, probably because there were not the same reasons existing in that Colony for abstinence, that exist in this. The question is, whether, notwithstanding the Act of the Imperial Parliament has not been adopted in the Colony, there is anything to restrain this Court from holding that a person amenable to the summary jurisdiction of Justices of the Peace, under a local ordinance, inflicting penalties, has a right to defend himself by Counsel or Attorney. This question has never been solemnly decided by this Court. It is true that about two years since, a *mandamus* was applied for (no cause being shown) to the Justices sitting in Quarter Sessions, at Bathurst, to rescind a rule which they had made to prevent Attornies being heard as Advocates in that Court. This Court having reference to the statute 9 Geo. IV, c. 83, s. 19, was of opinion, until the contrary was shown, that the Justices had no power to make such a rule (even if not repugnant to the laws of England), inasmuch as the right of making rules of practice for Courts of Quarter Sessions was vested in the Governor, with the assistance of the Judges of the Supreme Court, and as it did not appear that the rule in question had such sanction, the rule *nisi* was issued, without any resistance on the part of the Justices. The only other case bearing on the question, occurred in the commencement of this term, when a motion was made, by Mr. *Therry*, for a rule *nisi* for a *mandamus*, on the part of Mr. *John Dillon*, an attorney of this Court, to be directed to a Magistrate at Port Macquarie, to compel him

to hear that gentleman, on behalf of a client summoned to the Bench, under a penal ordinance. No decided opinion was given on the question, but two of the Judges thought a *prima facie* case was made out, and granted a rule to show cause in order that so important a point might be fully discussed and determined. When the case was called on for argument on Saturday, the 5th instant, no one appeared in support of the rule, and the matter was struck out of the paper. The question having been now distinctly raised, and ably argued on both sides, we are in a condition to determine it. Until the decision of *Collier v. Hicks* (6), in 1831, it was considered a moot point, whether a party summoned before Magistrates sitting judicially, to administer justice in a summary manner under a penal statute, had a right to the benefit of professional advocacy and assistance in the conduct of his full defence. It is true, indeed, that in *Rex v. the Justices of Staffordshire* (7), Mr. Justice Bayley did intimate, as an "*obiter dictum*," that an Attorney has no right to be present assisting a defendant charged with an information on the game laws; but that was never considered as law, until the case of *Collier v. Hicks*, which decided that no person has by law a right to act as an advocate on the trial of any information before Justices of the Peace, without their permission. All the decisions of the Courts at home upon this subject, as far as they went, left the concession of the privilege to the indulgent and courteous discretion of the Justices, even though they were sitting judicially in an open Police Court. We are now to consider whether *Collier v. Hicks* is obligatory on this Court, as an exposition of the law of England. After the passing of the late Act, 6 and 7 Will. IV, c. 114, it is clear that that decision is no longer binding upon Her Majesty's subjects in the mother country. The law, as it is propounded by the Judges, has been, in fact, repealed by Parliament, and the decision overturned by the highest constitutional authority. The second section of that Act is in these words:—"And be it further declared and enacted, that in all cases of such conviction, persons accused shall be allowed to make their full answer and defence, and to have all witnesses examined and cross-examined by Counsel, &c." Can we, therefore, now consider *Collier v. Hicks* as controlling our judgment, after the Legislature has thus overruled it? Although the Repealing Act has not been adopted in this Colony, it appears to me that we are not now fettered by a decision which is no longer law, and that we are at liberty to decide this question upon principle, and as if no such decision had ever been made. Without at this moment adverting to the question whether this Act is *ipso facto* to be carried into operation in this Colony, not

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1839. being formally adopted by the local Legislature, I think it could not be maintained, that the Judges of this Court, sitting in a Colony peculiarly English, and forming an important portion of the British Empire, must shut their eyes to an Act of Parliament passed since the 9 Geo. IV, c. 88, up to which time all laws and statutes in force within the realm of England, it is enacted thereby, shall be applied in the administration of justice in this Colony. Assuming that we might not be bound to take judicial notice of it, because not formally adopted by the local Legislature, I take it that we might have reference to it in order to ascertain what the law of England is on this particular subject, and enforce the principle of it, if not repugnant to any sound attributes of justice in this Colony. But for the passing of the Prisoners' Counsel Act, this Court would no doubt have bowed with deference to the decision alluded to, though decided since the 9 Geo. IV, c. 83, but I apprehend that, in the altered state of the law, we are not now fettered by that judicial exposition of the point, and might deal with this case as if there had been no decision at all upon the question, and if this were a case of the first impression, and to be decided on principle. Independently of any Act of Parliament, I take it to be a principle of the law of England and of natural justice, that every defendant, whether in a civil or criminal judicial proceeding (summary or not), has a right to be fully heard in person, in defence of his property, his fame, his liberty, or his life. The question then is, whether this is to be restricted to the right of being heard only in person, and may not be delegated to a professional advocate, properly qualified, and conducting himself with that respectful decorum which ought to characterise the proceedings of every Court of Justice. The right of being heard by counsel, it is not disputed, is inherent in every party amenable to the jurisdiction of superior Courts of Justice, and was only limited until lately in Criminal Courts, to the extent of restraining the advocate from addressing the jury on the evidence. The temperate and orderly proceedings of every tribunal obviously require the concession of this privilege, independently of the higher considerations of impartial justice. I am unable to discover any sound reason for making any distinction in principle between a superior and an inferior Court, in the all important duty of administering justice. If it be necessary to allow this privilege in the higher Courts, how much more cogent are the reasons for its concession in inferior jurisdictions, especially in this Colony, where magistrates, sitting judicially in remote districts, are called upon to enforce in their summary jurisdiction a vast variety of penal laws, without the advantage of professional assistance. It is no disparagement to their

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honour, their integrity, or their general good sense and intelligence, to imagine the possibility of their deriving advantage from the assistance of an advocate duly qualified in the satisfactory administration of laws, often complicated, and involving to the parties concerned, important rights of property and liberty. It may be, as Lord *Tenterden* says, in *Collier v. Hicks*, "that in general the ends of justice will be sufficiently well attained in summary proceedings before Justices, by hearing only the parties themselves, and their evidence, without that nicety of discussion and subtlety of argument which are likely to be introduced by persons more accustomed to legal questions"; but these considerations ought not to outweigh the recognition of a right, which in some instances may be of vital importance, especially so in those cases where the decision of the inferior Court is final and conclusive, both of law and fact. Time was (and that at no great distance) when, by the law of England, in criminal cases, the party accused had not the privilege of having his witnesses examined on oath. The enlightened morality, however, of modern legislation has gradually ameliorated our criminal code, and the late Act of the Imperial Parliament, although not a crowning step, has vindicated the majesty of justice in all her temples and given vigour to her attributes. It is not necessary to discuss the import of the word "declared," in the second section of the Prisoners' Defence Act; it is sufficient for the purpose of the present case, to recognise, that by the now law of England, "in all cases of summary conviction, persons accused shall be admitted to make their full answer and defence, and to have witnesses examined and cross-examined by counsel or attorney." Acting upon the spirit of that law, though not formally adopted by our local Legislature, and there being now no decision of the Courts at home to fetter our judgment, I should have been of opinion that the rule for a *mandamus*, in the present case, ought to be made absolute. But, although it is not necessary to the decision of this particular case, to determine the general question, so ably argued, as to the operation of the Statute in this Colony, without the express adoption of it by an ordinance of the local Legislature, it may be proper to intimate our opinion upon it, as we are now on the eve of a criminal session of the Supreme Court, when in all probability the question might be raised for discussion before a single Judge, who would be unwilling to determine it without the assistance of his brethren, and thus inconvenient delay in the proceedings of the Court might arise. By the *New South Wales Act*, 9 *Geo. IV*, c 83, *sec. 24*, all laws and statutes in force within the realm of England, at the time of passing that Act, not being inconsistent therewith, shall be

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1839. applied in the administration of justice in the Courts of this Colony, so far as the same can be applied within the same. This was a peculiar provision purposely introduced to remove all doubts of the applicability of all the fundamental laws of England to this newly-planted Colony, so far as they could be applied. In that elaborate Act, so often renewed, I find nothing restrictive of the applicability of other fundamental laws in the administration of justice, which have been since passed by the Imperial Parliament. There being nothing to restrain the Courts of the Colony from applying such laws, the reasonable inference is that the Legislature intended that they also should be as much in force (subject to the same modification), as those which were in force in England prior to the 28th July, 1828, the date of the Act. It is true, that by the same Act (sec. 21), the Governor, with the advice of the Legislative Council, has power and authority to make laws and ordinances for the peace, welfare, and good government of the Colony; but this is obviously the power only of making local, not fundamental laws; for the section enacts the proviso that "such laws and ordinances shall not be repugnant to this Act, &c., or to the laws of England." There is nothing said about the power of adopting by local ordinances any fundamental laws affecting the personal rights of Her Majesty's subjects, already passed by the Imperial Parliament, which can be applied in the administration of justice in the Colonial Courts. It appears to me, therefore, that by necessary implication, any fundamental law, affecting the personal rights of British subjects, for the due administration of justice, passed since the 25th July, 1828, not repugnant thereto, is in force in this Colony, as far as local circumstances will admit, without the formal adoption of them by the local Legislature. The right of appearing by counsel or attorney, as conveyed by the late Act, I regard as a fundamental personal right. The laws of this Colony are strictly English, or are not contrary to the law of England or the Act 9 Geo. IV, c. 83, except such as peculiar local circumstances may have justified a departure therefrom. In the administration of justice in the Courts of this Colony, we have been constrained to act in innumerable instances upon judicial expositions of the law of England by the Courts at Westminster, decided since the passing of the New South Wales Act, but nobody ever dreamed that it was necessary to have such decisions adopted by ordinances of the local Legislature, to give them validity in the Colonial Courts. Shall therefore a fundamental law regarding a personal right for the due administration of justice, enacted by the Queen, Lords, and Commons, in Parliament assembled, be less obligatory upon us, for want of formal adoption, than were judicial decisions?

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But for the *Prisoners' Counsel Act*, we should have felt ourselves bound by the decision of the Judges in *Collier v. Hicks*, without the adoption of the local Legislature. That decision has been virtually overruled by Parliament, which has declared and enacted a different exposition of the law of England, upon a fundamental principle in the mode of administering justice; and as I cannot find any technical rule restraining us from adopting and acting upon the law of England as it is now enacted, I have no hesitation in holding that the provisions of the *Prisoners' Counsel Act*, regarding as they do the sacred interests of justice, are in force in this Colony, so far as they can be applied, and there is local machinery to set its principles and provisions in operation.

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WILLIS, J. Before I state the grounds which induce the conclusion that in this case I have arrived at, I wish to notice some of the arguments at the bar, which, though not, perhaps essentially necessary to be taken into consideration in deciding this matter, seem to me of too much general importance to be admitted to pass without observation. The argument urged by Mr. *Purefoy* (a gentleman who, if I have any powers of vaticination, will be a most useful member of the Australian bar) against the policy of permitting counsel to defend an accused party, has had the sanction of the highest authority. Sergeant *Hawkins*, after stating the rule, says, with reference to the rule I have just read—"This indeed many have complained of as very unreasonable; yet, if it may be considered, that generally everyone of common understanding may as properly speak to a matter of fact as if he were the best lawyer, and that it requires no manner of skill to make a plain and honest defence, which, in cases of this kind, is always the best; the simplicity, the innocence, the artless, and the ingenious behaviour of one whose conscience acquits him, having something in it more moving and convincing, than the highest eloquence of persons speaking in a cause not their own. And if it be further considered, that it is the duty of the Court to be indifferent between the King and prisoner, and to see that the indictment be good in law, and the proceedings regular, and the evidence legal, and such as fully proves the point in issue, there seems no great reason to fear but that generally speaking, the innocent, for whose safety alone the law is concerned, have rather an advantage than a prejudice in having the Court their only counsel. Whereas, on the other side, the very speech, gesture, countenance, and manner of defence of those who are guilty, when they speak for themselves, may often help to disclose the truth, which probably would not so well be discovered from the artificial defence of the others speaking for them." I venture, however,

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with all respectful humility, to dissent from so high an authority, and to think the modern doctrine, as enacted by the *Prisoners' Counsel Bill*, much more reasonable and just; but because I do think so, it by no means follows that Mr. *Purefoy* was not perfectly warranted in pressing his able and ingenious argument on the notice of the Court. On the other hand, my friend Mr. *a'Beckett*, read some very able comments of a modern author, on the report of the Commissioners of legal inquiry, showing the expediency of the recent Act of the British Parliament. What, however, may be expedient for the Legislature to enact, may not be lawful (unless it may be in strict accordance with existing law) for a Judge to decide. I entirely agree with that eminent lawyer, who, in the argument I shall have hereafter to refer to, most justly said, "Let one suppose that, in consequence of some grievous treason, it is necessary to try some offenders by special commission, or that such violation of the public peace, in murders and robberies, occurred, as made a speedy conviction and execution of the offenders not only salutary but essential to the public good—or that, under a military commission, it was necessary that the General should be entrusted with extraordinary powers—should the most imminent necessity, the most manifest peril and jeopardy to the *salus publica*, authorise any of the learned judges, or any commander, either civil or military, to assume such authority? Or could it amount to anything in the nature of a legal excuse, unless the power was expressly given by commission from the Crown? I do state that, having looked anxiously into many books to see whether necessity would authorise any person to act in such a case, although under the influence of the purest intentions, there is no authority or usage which warrants such an assumption, and practice is in every respect against it. (See Mr. *Nolan's* argument in Sir *Thomas Picton's* case (8), p. 954). In this and every other case, therefore, where I am not bound by a previous decision of this Court, I shall endeavour to act upon the law as I find it, and not upon what has been called "the tyrant's plea," viz., necessity or expediency. My friend, Mr. *Windeyer*, attempted to draw a parallel between the *Prisoners' Counsel Bill* and the 32nd Geo. III, c. 60, commonly called the *Libel Act*. I doubt much that the parallel will hold. It is but justice, however, to my learned friend, to state, that by the *Libel Act* "it is declared and enacted," as therein mentioned. This, Lord *Coke*, I believe, had long before laid down as law, "that the right of the jury to decide the whole issue applied equally to criminal and civil causes," (1 Inst. 226 and 227). It is said that when the statute passed, no doubt existed as to civil cases, and the Act declared

(8) Thirty State Trials, 954.

the doubts which were suggested as to criminal cases to be contrary to law. The statute at once professed to be declaratory, and (though strongly opposed by Lord *Thurlow* and Lord *Mansfield*) was suffered to pass as a declaratory Act. Mr. *Fox*, in his introductory speech, expressly characterised it as a declaratory bill; he protested against "anything like innovation"; he reprobated the doctrine of the judges, with regard to juries being only judges of mere fact, as of "modern date"; and when the bill was committed, he called for the sense of the house on this very point which put the matter beyond doubt. "If the committee were clear as to the law on the subject, he thought their wisest and most proper measure would be, to enact a declaratory law respecting it. If the committee were of opinion that the high authorities (namely, the judges) on the other side of the question made the law doubtful, they might settle the law on the subject in future, without any regard to what it had been in times past." (See *Fox's Speech*, vol. 4, p. 245-262). The bill passed as a declaratory law. Dr. *Bissett*, in his life of George III, vol. 2, p. 323, says—"This bill was not debated as a party question, but as a subject of existing law, justice, and constitutional rights." Mr. Justice *Stephen* asked in the course of the argument whether if the *Prisoners' Counsel Bill* was, *per se*, in force in this Colony, Sir *John Campbell's* Bill for the Abolition of Imprisonment for Debt, would not have been also in force previously to its express adoption by the Legislative Council, on the very same principle? In addition to what I then ventured to read as explanatory of my view on this subject, I would now take leave to call His Honor's attention to what strikes me as an essential distinction between the Bill for the Abolition of Imprisonment for Debt and the *Prisoners' Counsel Bill*. The former abolishes a power that was, for the most part, put in motion between subject and subject, with reference to property; the latter confers a privilege on the subject against the power of the Crown with respect to the person—it adds to the great constitutional right conferred by *Magna Charta*, "that no free-man shall be apprehended, or imprisoned, or banished, or in any other manner disparaged, except by the legal judgment of his peers, or by the law of the land." It adds to this, I say, that no such judgment shall pass without all freemen being permitted previously to defend themselves by counsel. To proceed, however, to the question more immediately before us. This application is for a *mandamus*, to compel a Magistrate to hear an attorney on behalf of a party accused of an offence, which, if proved, would subject him to a penalty on summary conviction. At common law a person accused of felony was not entitled to make full defence by counsel; but it is contended that the principles of the common law were in favour of

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making such a defence by counsel or attorney in case of summary conviction. Summary convictions, however, were unknown to the common law. How, therefore, could it be applicable to circumstances to which it is a stranger, the common law itself being nothing but immemorial custom, applicable to certain well-known facts? I believe the decision in the Court of King's Bench, in *Collier v. Hicks* (9), to have been perfectly legal, and that previously to the *Prisoners' Counsel Bill*, it was entirely discretionary with the Magistrates to hear or not to hear an attorney on behalf of either the informer or the accused in cases like the present. It was on this ground, and without reference to the *Prisoners' Counsel Bill*, that I differed from my colleagues in *ex parte Dillon*. I admit that there was a seeming inconsistency in a party who had committed an assault, for instance, being permitted to make full defence by counsel or attorney, if tried at Quarter Sessions before several Magistrates and a jury, and depriving him of that privilege, if about to be dealt with for the same offence, by two Magistrates only, under the Statute 9 Geo. IV, c. 31, s. 27. An anomaly similar to that which prevails here in the case of the unfortunate convicts who, if tried before the Supreme Court, have the advantage of trial by jury, and yet, if brought before the Court of Quarter Sessions, for a like offence, may be dealt with by the Magistrates in a summary manner. The *Prisoners' Counsel Bill* having become the law of England, the point now for decision is, whether, although this law has passed since the statute 9 Geo. IV, c. 83, for the administration of justice in the Colony, and has not hitherto been expressly adopted by the local Legislature, that which is now become a fundamental constitutional personal right of British subjects, can be denied them in this Colony. The *Prisoners' Counsel Bill* is, I think, as much the birth-right of an Englishman as the *Magna Charta*, the *Habeas Corpus Act*, the Bill of Rights, or the Act of Settlement. I agree with Mr. *Nolan*, in his most able argument in *Sir Thomas Picton's case* (10), and I consider the authorities he has cited indisputable, and the inferences he has drawn from them in a great measure applicable to the present point, and unanswerable. When the British sovereign goes from England, his accompanying subjects are entitled to the benefit of the English law. When the Court of King's Bench travelled into Scotland with Edward I, it administered justice in Scotland, not according to the Scotch law, but according to the law of England. It is manifest, therefore, that the circumscribed limits of Colonial laws cannot prevail against the law of England in such case, and that the laws of England are not so confined to that kingdom, but that there are circumstances

(9) 2 B. and Ad., 663.

(10) Thirty State Trials, 954.

in which they extend throughout the British dominions, and even beyond them. Thus by the statute 33 Henry VIII, c. 23, murderers, or persons suspected of murder, after examination by three Privy Councillors, may be tried by Commissioners, at such place as may be appointed, "in whatsoever shire or place within the King's dominions, or without, such offences were done or committed. If then, for instance, as was well put by Mr. *a'Beckett*, the seven unhappy men who were lately tried and executed in this Colony for a most wanton and barbarous murder of a number of the aborigines, had, in consequence of the removal of the Queen and the Queen's Bench into this Colony, been tried before that Court, or had been tried by Commissioners, appointed under the statute of 33 Henry VIII, c. 23, in either of such cases the prisoners must have been tried, I conceive, according to the law of England, as it existed at the time of such trial, and they would have been entitled to make full defence by counsel, a privilege which (possibly, under an erroneous impression) was not claimed by them, but had it been claimed by them and accorded (however manifest the guilt was of these unfortunate men, in my mind, at least), who can say what might have been the effect of an impassioned and eloquent defence by counsel on the minds of the Jury. I mention this, merely by way of illustration of the question which I consider to be now at issue—a question which, I repeat, appears to me to be no less than this:—Are the personal rights, those personal rights which are the fundamental, constitutional, and inherent birthrights of British subjects owing allegiance to the British crown (personal rights, I say, as contradistinguished from rights connected with the enjoyment of property), to be denied them within the British dominions, more especially in a Colony like this, which is by express statutory regulation to be governed by the laws of England? I at once admit (as it is stated by Mr. *Howard*, in the introduction of his valuable work on colonial law, p. 10), that according to the principle of the decision by the *Privy Council* of the case in 2 *P. Williams*, p. 75, it follows that in Barbados, the Leeward Islands, the Bahamas, and the Bermudas, all of which were original settlements of British subjects, the common law of England, and all Statutes of the British Parliament applicable to their situation and condition, passed previously to the islands being respectively so settled, and having a local Legislature of their own, are in force, except such as have been varied or renounced by their respective local Governments." On the word "previously" Mr. *Howard* subjoins the following note, which appears to have been extracted from *Pownall's Administration of the Colonies*, p. 128:—"Nay,

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further, every Act of Parliament (*e.g.*, the Bill of Rights) passed since the establishment of the Colonies, which relates to the general police of the realm, or the rights and liberties of the subjects of the realm, although without the intervention or express consent of their own respective Legislatures or representatives hath been considered, and I may venture to say adopted, as a part of the law and constitution of those countries." The principle on which this is based is, I think, fully explained in the able and irresistible argument of Mr. Nolan, in Sir Thomas Picton's case, already alluded to, which also clearly (to me, at least) shows the grounds on which, in the Island of Nevis, the writ of *habeas corpus* is obtained both at common law, and in favour of liberty by the Act of Charles II, though that Act passed long subsequently to the legal settlement of the island. (*Vide Clarke's, Colonial Law*, p. 157). I may here remark, simply as a matter of fact and not by way of argument, that in Grenada, where the Court follows the laws and rules of the Criminal Courts in England; and in the Criminal Courts of Tobago, Jamaica, and the Bahamas, where also the English law, and rules of practice prevail (see *Clarke's Colonial Law*, under these several heads), prisoners are allowed to make full defence by counsel. The statute of 9 Geo. IV, c. 83, after having previously enacted that no laws made by the local Legislature should be repugnant to the laws of England, provides that all laws and statutes in force within the realm of England, at the time of passing that Act, shall be applied in the administration of justice in this Colony—a provision which being in strict accordance with the decision reported by Peere Williams (11), must, I apprehend, be taken with precisely the same limitation. This indeed is fully proved by the following example:—The Act 10 Geo. IV, c. 7, for the relief of His Majesty's Roman Catholic subjects, though containing a provision that the oaths therein mentioned should be taken in certain specified courts of the United Kingdom, was, by the Act of the local Legislature, 10 Geo. IV, No. 9, 8th January, 1830, not adopted in the manner that the other Acts of the Imperial Parliament are adopted in this Colony, but "it was thereby enacted that the said Act of Parliament extended to and was in full force, and the same was thereby declared" (and rightly declared, it having conferred upon, or restored to a portion of the subjects of the British Crown, certain fundamental constitutional personal rights, which had previously been withheld) "to extend to and be in full force in this Colony, in the same manner in all respects as if the said Act had contained a positive clause to that effect." Thus was this Statute "declared" to be law, and not "adopted" as law—declared

to be law, though passed subsequently to the statute 9 Geo. IV, c. 83, which introduces the law of England, only up to the time of passing that Act. The words of the *Prisoners' Counsel Bill*, are "all persons"; there is no limitation whatever to England and Ireland, and Scotland is excepted merely because by the civil law which prevails there, prisoners already enjoyed that benefit. This Act confers a fundamental constitutional personal right of the highest importance on every British subject, and in my opinion, therefore, like the Roman Catholic Relief Bill, extends to all subjects owing allegiance to the Queen throughout the British dominions, and certainly not less so to those who in this Colony have the happiness to live under English laws, than to any others. "Justice," says the poet,

" — like the liberal light of Heaven,
Unfettered shines on all."

Some there are who might have deemed it expedient to delay the introduction to this Colony of this great constitutional privilege, if it were still a matter of choice. In my opinion, however, there is now no option. I could have wished that the local Legislature had promulgated the *Prisoners' Counsel Bill*, in the same manner as the Roman Catholic Relief Bill was declared to be the law of this Colony; but whether there be or be not any such promulgation, I in my conscience am bound to declare, that I conceive it to be at this moment the law of the Colony, to be one of those fundamental constitutional personal rights for securing the liberty of the subject, which, like liberty itself, according to a celebrated writer, "should reach every individual of a people, as they all share one common nature; if it only spread among particular branches, there had better be none at all, since such liberty only aggravated the misfortunes of those who are deprived of it, by setting before them a disagreeable subject of comparison." (*Addison*, "Spectator," vol. 4, No. 287.)

STEPHEN, J. I concur in opinion with the rest of the Bench, that the *mandamus* applied for in this case ought to issue. It is my misfortune, however, to dissent from both my learned colleagues, as to the grounds of our decision. Their Honors have determined, that the *Prisoners' Counsel Act*, in common with every other Act conferring a constitutional personal right, extends to this Colony; and that therefore the privilege contended for exists by virtue of an express enactment of the British Parliament. I also think the principle exists, but *as at Common Law*, and not by force of any enactment whatever. With unfeigned respect for the learning and experience of those from whom I thus differ, I cannot bring my mind to agree with

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them. I think that the *Prisoners' Counsel Act* does not extend here. If it does, there is no sound reason, as it appears to me, for holding that any other general Act, especially if it relate to the administration of justice, does not equally extend. The Court will thus have opened a flood-gate, through which, I fear, there will from time to time be let in upon us, without preparation or the time for preparation, a host of enactments; the consequences of which, no man can venture to foretell. If the *Prisoners' Counsel Act* extends here, why does not the recent Act for liberating the person from arrest, except in case of meditated flight, extend here? Why does not every Act, of the many passed from time to time, for altering the punishment in criminal cases? So of various other Acts, which it would be easy to enumerate. Yet hitherto, local Acts have been thought necessary for adopting them. Indeed if a local law be not required or be not resorted to in these cases, there would (and in future there will), as it seems to me, be innumerable difficulties arising. From what date, for instance, are the provisions of an act to commence? If, in England, the Act began to operate from the day of its passing, it would operate in this Colony, I presume, from the day of its arrival. But how is that fact of arrival to be determined? On the other hand, if the Act be appointed to commence in England, as is usual, from a future fixed day (which will generally have expired, before we can hear of the enactment itself), how is a corresponding period to be settled for its commencement here? Look at the many Acts passed of late years, for altering the mode of succession to property; for altering the law of dower; for limiting the periods within which various actions may be brought, and so on. Now all such laws as these, and all which in any way alter the criminal law, it was admitted at the Bar, must be holden to extend here (on the principle contended for), if the *Prisoners' Counsel Act* does. Let us only reflect on the consequences of the instantaneous commencement of laws so extensive and so important. One of the least is, that the functions of the local Legislature will, for ever, be reduced into such narrow limits as that its institution must become almost useless. I cannot find that this is the law; I cannot believe that this was ever intended by Parliament. The observations at the Bar, as to the constitution of the legislative body, have no weight in this question. If the present Legislature have not an option, in determining whether recent English statutes shall or shall not extend here, neither (if the principle contended for be worth anything) will any future legislative body possess it. But, as I conceive, the Parliament gave the Colony a Legislature, on purpose that it might exercise that option. It said, in the Act to which this Court owes its existence,

up to this period we legislate for you; take all our present laws, all the laws now in force; and from this date legislate for yourselves. Let us consider the reasonableness of this. In the case of burglary or house-breaking for instance. In England, there may have been many local reasons, why crimes should not be capitally punished. They may be unfrequent; there may be considerable protection against them; when committed, there may be easy means of detecting the offenders; very few houses may be isolated, at a distance from neighbours; and there may be other reasons. But, in this Colony, there may be a state of things the very reverse; and the Legislature may conceive, that, without the severest punishment those crimes may continue, and no man's dwelling, in this scattered population, be secure. Yet the law of England, passed only with reference to the state and condition of England, is to prevail; the local Legislature can have no voice in the matter.—And so of other Acts. As to the *Prisoners' Counsel Act*, there seems every reason why this Legislature should, if in any case, have the option spoken of. If the case of *Collier v. Hicks* (11) be law, persons under prosecution before Magistrates in their summary jurisdiction, have no right to professional assistance. On the contrary, the Magistrates have a right to determine, who shall act as advocates before them; or whether any advocate shall be allowed at all. But setting the case of summary convictions aside, we come to that of felonies. Here, at all events, there is no room for doubt. The law is clear. A prisoner under trial for felony has not, and never had, a right to full defence by Counsel in England. In England, after much debate, this state of things has recently been altered. And perhaps it will be conceded, on all hands, that a similar change would, abstractedly, be desirable here. But, local circumstances may not immediately admit of it. The state of things, as affecting this question, here and in England, may be essentially different. One has to consider the extent of crime, as compared with the population; the state of the Bar; the state of business in our Courts; the length of time which it is possible to devote to Criminal Trials; and so on. Now, the Colonial Legislature may form an erroneous opinion, on all these points. But, that is not the question. It is, whether those points shall or shall not be considered. This Court, however, has constitutionally no power to consider them. In England on the other hand, they cannot have been considered. The Parliament legislated, alone, for the Courts, and the Countries known to it. But where were the means of judging, on such points, for these Colonies?—And, where was the necessity; when there notoriously existed a local

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1839: Legislature, to determine them ; by that Legislature therefore, in my opinion, they should be determined. It should have (and in my humble judgment it has), the right of following the example of the parent Legislature, or of rejecting it, or postponing its adoption to a more convenient season, or of enacting the measure wholly, or subject to conditions, or in part as it may see fit ; according to local exigencies, and expediency. I think this, not only of the *Prisoners' Counsel Act*, but of every other, passed since the time when a local Legislature was conferred upon the Colony. I conceive, too, that this is a proposition, of which the maintenance is, in every point of view, most important. The power of which I speak, may, occasionally, be of the last moment. The Colonial Legislature may be of opinion, and rightly, that a change in the law beneficial in England, and passed perhaps in reference to considerations existing only in England, is however applicable, highly inexpedient, or prejudicial, in New South Wales. The Legislature would gladly reject, therefore, or at least would modify or postpone it. But, if the principle contended for, as to the operation of English laws in this Colony, be at once admitted, and according to my impression, though, perhaps a mistaken one, of the judgment of this day, that principle is inevitably recognised, no such power can be exercised. At all events, every such power is at an end, with respect to the *Prisoners' Counsel Act* ; although a power be thereby for the first time conferred, which previously existed, not by the Constitution, nor at Common Law, nor by Statute, and a power be on the other hand taken away which the Court of King's Bench has said, that magistrates by that law fully possess. Such an Act, in my opinion, will not extend to this Colony, unless named, or unless by necessary and unavoidable construction, such extension was intended. We are not to infer such an intention, merely because the enactment is equally fitting. Nor, because it can equally be carried into effect. The question must *bona fide* be, for what places did Parliament really mean to legislate. But the general rule is—a rule laid down in twenty cases, and repeated in every text book—that, except as above excepted, Statutes passed since the settlement of a Colony, did not extend there. In other words, the general presumption is, that Parliament did not mean to legislate for the Colony. I can discover nothing in the *Prisoners' Counsel Act* to overcome that presumption ; nothing to take it out of the ordinary, and I conceive, established rule in such cases. The provision in the New South Wales Act of 9 Geo. IV, appears to me to fortify this opinion. That Act was passed to provide for the government of these colonies, and the administration of justice therein ; and it enacts, that all the laws of England, then in force in England, should, so far as they could be applied, be equally in force here. What does this mean, but that, as to all laws subsequently passed, something

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more would be required to give them operation in the Colony? And does it not imply that, but for that enactment, even the then existing laws (or such of them, at least, as had been passed since the previous New South Wales Act of 4 G. IV) would have had no such operation? The effect of the enactment seems, to my apprehension, clearly this:—It is as if all such then existing English Statutes had been thereupon reprinted for the Colony; the Colony being actually named therein, and the whole being actually collected, and bound in the Colonial Statute Book. Every such law, in short, would operate here, not because it was law in England, but because, by express provision, it had been made the law of the Colony. And thus, not one leaf can be added to, or subtracted from that Statute Book, merely because of additions to, or alterations in the Statute Book of England; for, with the latter, *per se*, we have nothing whatever to do. A Statute thus once adopted into the Colonial Code, and forming part of that Code, would (according to this view of the subject) no more cease to exist there, because its original ceased to exist in England, than a graft would cease to live and flourish, because of the death of the parent tree.

The rest of His Honor's judgment, of which we have no notes, related to the grounds on which he was, nevertheless, in favour of the *Mandamus*. These were, that he regarded the 2nd section of the Prisoner's Counsel Act, (relating to summary convictions), as declaratory; or, in other words, though of no value as an enactment, yet decisive as a legislative affirmation of a fact, as an authoritative statement, that the privilege claimed in this case always existed. He regarded that section, especially when coupled with the reasonableness of the claim, and the general opinions which prevailed in its favour, prior to the case of *Collier v. Hicks*, founded on principle, and analogy, as equivalent to a reversal of the decision in that case.

His Honor then proceeded to assign reasons, at some length, for the opinion which, but for that decision, he said that he should unhesitatingly have entertained as to the validity of that claim. He concluded by expressing his gratification, as an individual, that, however acquired, the right of full defence by counsel would now be in operation. He did not think that the Court had the power of conferring that right; but he was glad, nevertheless, at the immediate result, because he was sure that it would be in every way favourable to the ends of justice. He had, in his official capacity, introduced a law into the Legislative Council of the sister colony three years ago, giving the right in question, as in England, and he could testify, from personal observation, that the measure had neither impeded nor retarded the administration of justice in that Colony. He believed that, on the contrary, the measure was practically beneficial, and he thought it as wise as it was just.

Order accordingly.

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Nov. 26.

English Bankrupt Law—9 Geo. IV, c. 83, s. 24—Ex post facto legislation.

Douling C.J.
Willis J.
 and
Stephen J.

The English Bankrupt law (6 Geo. IV, c. 16) is not in force in New South Wales.
 (Per the C.J.) The adoption of this statute is beyond the power of the Court, and would be in fact *ex post facto* legislation.

(Per Stephen J.) The question of the applicability of English statutes must be determined with reference to the date of the New South Wales Act alone.

THIS was a petition to the Court in its equitable jurisdiction for the issue of a Commission in Bankruptcy under 6 Geo. IV, c. 16.

The facts appear in the judgment of the *Chief Justice*.

THE CHIEF JUSTICE. This is a petition on the part of Mr. *Saul Lyons* to the Judges, in virtue of the Equitable Jurisdiction of the Supreme Court, given by the New South Wales Act 9 Geo. IV, c. 83, s. 11, praying that a Commission of Bankruptcy may issue under the seal of the Court, in pursuance of the English Bankrupt Act, 6 Geo. IV, c. 16, against *John Thomas Wilson*, dealer and chapman, late of Sydney, it being alleged that he had become bankrupt within the meaning of the last mentioned statute by departing from the Colony and remaining abroad with intent to defeat and delay his creditors. It was contended in support of the petition, that by force of the 9 Geo. IV, c. 83, s. 24, the English Bankrupt Act, 6 Geo. IV, c. 16, is applicable to this Colony, and that the Judges are bound to carry it into effect. I own I have not yet recovered from the surprise I experienced when I first heard it intimated that an argument was to be gravely raised on this question, because I know that it had been the impression of every Judge who has sat on this Bench since the establishment of the Supreme Court, and, I believe, of every professional man in the Colony, that however desirable it might be to have some bankrupt law enacted by the local Legislature, yet that the bankrupt law of England was wholly inapplicable to and could not be carried into operation in this part of Her Majesty's dominions. The question, however, being now solemnly raised we are bound to decide it. The 24th section of the New South Wales Act enacts, "That all laws and statutes in force within the realm of England at the time of the passing of this Act (not being inconsistent herewith,

(1) *The Sydney Herald*, 27th November, 1839.

or with any charter, or letters patent, or order in council, which may be issued in pursuance hereof), shall be applied in the administration of justice in the Courts of New South Wales, so far as the same can be applied within the Colony; and as often as any doubt shall arise as to the application of any such laws or statutes in the said Colony, it shall be lawful for the Governor, by and with the advice of the Legislative Council, by ordinances to be, by them, for that purpose, made, to declare whether such laws or statutes shall be deemed to extend to the Colony, and to be in force within the same, or to make and establish such limitations and modifications of any such laws and statutes within the Colony as may be deemed expedient in that behalf provided always, that in the meantime, and before any such ordinances shall be actually made, it shall be the duty of the Supreme Court as often as any such doubts shall arise upon the trial of any information or actions, or upon any other proceeding before them, to adjudge and decide as to the application of any such laws or statutes in the said Colony. Assuming that the petition now presented, comes within the words, "or upon any other proceeding," upon which a doubt has arisen, which I take to be questionable, because referable as *ejusdem generis* with the trial of any information or action over which the Court had clearly jurisdiction, as a proceeding actually pending, I shall at once apply myself to the discharge of the duty thus required to be performed by the Court. The question then is, whether the Bankrupt Law of England, which was in force before the 9 Geo. IV, c. 83 can, as a whole, or even in part, be applied or fitted to the wants of this Colony? The actual necessity for a Bankrupt Law is not to determine this question—the point is, whether *the English* Bankrupt Law is in itself applicable? There is one preliminary condition stipulated in the twenty-fourth section, as to the applicability of any English law or statute to the Colony, namely, that it shall not be inconsistent with the New South Wales Act. Now in the outset of this case there appears to me to be one paramount difficulty in applying the English Bankrupt Law. The officers by whom the law is to be carried into execution, are Commissioners to be appointed by the Lord Chancellor, who are paid certain fees of office, sanctioned by the authority of Parliament. Assuming, therefore, that by a strained construction, we could assume the powers given in terms to the Lord Chancellor of England, in issuing a Commission, what authority have we to create the office of a Commissioner with the right of demanding and receiving fees for his trouble? This Court derives no authority but what is expressly carved out by the New South Wales Act, which establishes the Supreme Court. By that Act, the Judges of the Court, and such

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Dowling C.J. Ministerial or other officers as shall be necessary for the administration of justice and for the execution of the judgments, decrees, orders, and process of the Court, are to be appointed *by the Crown*. Taking it that we might assume the authority of appointing the Commissioners, by what right could we order the payment of their fees? I hope this Court will never so far forget its promise, as to usurp the power of taxing her Majesty's subjects. This power is extended even to the local Legislature in a very guarded and limited manner. The 25th section enacts "that the Governor and Council shall not impose any tax or duty, except only such as it may be necessary to levy for local purposes, and the purposes for which every such tax or duty may be so imposed, and to or towards which the amount thereof is to be appropriated and applied, shall be distinctly and particularly stated in the body of every law or ordinance imposing every such tax or duty." Now, if the English Bankrupt Law were in force here, the Commissioners would be entitled to a fee for other duties specified in the twenty-second section. This Court, it is true, is authorised to make rules of practice for the conduct of business, but it is a novelty to me (as was contended) that the Judges have power to make rules, importing the creation of a new jurisdiction not conferred upon them by Act of Parliament. But waiving the difficulty thus pointed out, it is quite obvious from every clause in it, that the English Bankrupt Law could not be carried out into practical operation in this Colony. It contemplates a state of things that does not exist here. The initiatory jurisdiction is given to the Lord Chancellor alone; it authorises the appointment of Commissioners and other officers, and amongst others a Secretary in Bankruptcy by that high functionary only; provides for the publication of proceedings in the *London Gazette*, and English newspapers; the appointment by the Commissioners of Messengers, with powers under their warrant to break open houses and do other stringent acts, it imposes penalties on different parties, says what shall be done with bankrupts having privilege of Parliament, points out the course to be taken in seizing the effects of a bankrupt in Ireland and Scotland, prescribes the duties of Masters in Chancery and Masters Extraordinary, points out the course to be taken with the bankrupt's estates abroad and in colonies, regulates the mode of enrolling the proceedings under the Commission, makes provision as to copy-hold lands, exempts proceedings from stamp and auction duties,—in short, every clause of the Act contemplates a vast variety of matters and things unknown in this Colony; and we could no more fit the law, as it is thus enacted, to the state of this young country, than we could apply the English Marriage Act, the

English Poor Laws, Tithe Laws, Usury Laws, Revenue Laws, and many other laws not necessary nor convenient for this part of the world. It may be, and I think it is absolutely necessary for this Colony to have some Law of Bankruptcy, but it is neither convenient nor practicable to adopt the English Bankrupt Law, even if it were undeniably the best system ever enacted for a commercial people. One irresistible objection, if no other existed, to the application of the 6 Geo. IV, c. 16, would be the frightful expense involved, in order to carry it into operation. It was to remedy this evil that the statutes 1 and 2 Will. IV, c. 56, and 2 and 3 Will. IV, c. 114, were enacted, which have had a beneficial effect in the administration of the principles of the 6 Geo. IV. But even if we were now to decide that the Bankrupt Law of England is in force in the Colony, I do not see how it could help this particular case. All that we could determine is, that from and after the application for a petition for a Commission of Bankruptcy against *John Thomas Wilson*, the English Bankrupt Law 6 Geo. IV, c. 16, shall be in force in this Colony. But how would such a decision effect the alleged bankrupt? To make it effective, it must for some purposes be construed to have a retrospective operation. Some of the clauses are highly penal, and specially the 16th section, which makes it a transportable felony for life, if the bankrupt does not surrender to the Commission within six weeks. At the time this man left the Colony, neither he nor any other person considered the English Bankrupt Law in force in the Colony. Are we therefore now, to act as legislators in adopting a law so highly penal, and create in fact a new felony, in order retrospectively to affect a party, who, if he had known of the operation of the law here, might probably never have departed from the Colony. In effect we are called upon to make an *ex post facto* law, highly penal in its consequences and deeply affecting the rights of parties. We are called upon to usurp the powers of Parliament and of the Legislative Council. It is an acknowledged principle, which has never been disputed in a Court of English Law, that the power of making *ex post facto* laws binding on the subject, resides exclusively in the British Parliament, and cannot be constitutionally exercised by any other authority. Indeed, so sparingly and cautiously has this power been exercised even by Parliament itself, that if we look through the whole statute book scarcely six instances can be found in which it has been exerted, and those instances will be seen to have occurred in reigns not remarkable for a strict observance of the constitutional rights and interest of the subject. It is true that in the present instance Parliament has cast upon the Judges the duty of adjudging and deciding as to the application of English statutes to this Colony, but I apprehend

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1839. that this duty is to be observed with great strictness and caution, and is not to be enlarged by intendment or inference. If I entertained less doubt than I do as to the applicability of the English Bankrupt Law to the Colony, I should hesitate at this time, in coming *per saltum* to the conclusion that they are applicable. It is matter of history that this important subject has in two successive sessions been under the consideration of the local Legislature, and is still depending. It is notorious that the Legislature was moved to it, at the earnest representation of the Judges themselves (two of whom are now on the Bench), upon a conviction that the English Bankrupt and Insolvent Laws, as codes, could not be carried into effect, for want of the proper appliances to give them operation in New South Wales, and that the state of the Colony required a Bankrupt and Insolvent Law better suited to the wants of the community. None of us are ignorant of the fact that our respected brother Burton, with great pains and industry, framed a Bill, embracing everything valuable in the English Bankrupt and Insolvent Laws, and at the same time suggested remedies for defects, which it is not to be denied are inherent even in those laws of the mother country. Nothing but the grave importance of the measure (which is, as yet, ill understood, though simple and admirable in principle) has delayed its adoption, but I think we may indulge a sanguine persuasion that early in the next session the urgent want of some Bankrupt or Insolvent Law in the Colony will be satisfied. In anticipation of this, I think it would behove this Court respectfully to abide the deliberations of the Legislature, rather than come at once to the conclusion we are now called upon to adopt, even if the English Bankrupt Law were less doubtful. This Colony has, indeed, from a variety of causes—its position on the globe—its splendid climate—the influx of British capital—the genius of the English character—its freedom from direct taxation—and exemption from the restraints of prohibiting enactments, assumed a wonderful appearance of commercial prosperity; but this is no reason why a code of Bankrupt Law, which it has taken many ages to bring even to its present state of doubtful perfection, should at once, without due deliberation, be allowed to fetter the energies of New South Wales. After maturely considering the question, I am of opinion that the English Bankrupt Law *cannot* be applied to this Colony.

WILLIS, J. To the Attorney-General and the learned gentleman associated with him in this case my thanks are due, and those, I think of the public also, not only for bringing forward a question of such magnitude as to the applicability of the English Bankrupt Law to this Colony, but likewise for the legal ability, and above all for the deep

anxiety for the welfare and protection of the commercial community displayed on this occasion. The laws of bankruptcy (even in the unimproved state in which they were when Sir *William Blackstone* wrote) are, according to that learned commentator (see vol II, s. 471) "considered as laws calculated for the benefit of trade, and founded on principles of humanity as well as justice; and to that end they confer some privileges, not only on the creditors, but also on the bankrupt or debtor himself." At this time of day it would be considered a very harsh application of the term to speak of every bankrupt as a criminal. [*Ex parte Stoke* (2).] The spirit of the Bankrupt Law whets not the knife "To cut the forfeit from that bankrupt there" (*Merchant Venice*, Act IV, s. 2), though by fraudulently concealing his effects, he may still bring upon himself, most deservedly, the heaviest infliction of the law short of the punishment of death. (Stat. 6 Geo. IV, c. 16, s. 112). But a bankrupt who honestly gives up the whole of his effects to his creditors may, according to the present mild administration of justice, actually entitle himself to privileges which debtors not liable to the Bankruptcy Law cannot claim. Thus he is, by virtue of a certificate fairly obtained, exempted, with regard to all debts which might have been proved under the commission against him, from prolonged imprisonment (see 121st section of the statute just cited), and an honest bankrupt may never (in cases where the dividend paid affords reasonable evidence that he has not been speculating at the risk of others without funds of his own) entitle himself to a return of part assets (see 128th and 129th sections of the same statute). The operation of the Bankrupt Law is, unfortunately, I think, restricted to traders, for, as a modern writer truly says, "this affords, in comparison with the regular proceedings in superior Courts, a ready means of satisfying the creditor, as far as there is property to satisfy him, and inflicts but little unnecessary annoyance on the honest debtor, while at the same time it awards punishment to the dishonest debtor. Such being the effect of this law, it is difficult at first sight to conceive on what grounds any of Her Majesty's loving subjects should be deprived of the benefit of it; and yet they are in large numbers so deprived, all persons who are not traders being excluded from its operation. To this I add that many traders, even who are British subjects, and trading to England, have hitherto been subject to this deprivation, and I now illustrate this assertion by its application to this Colony. True it is, that although the subjects of Great Britain, who are the discoverers and first inhabitants of a colony, carry there with them their own inalienable birthright—the laws of their country—

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nevertheless, they carry only so much of these laws as is "applicable to the condition of an infant Colony," and that the artificial refinements and distinctions incident to the property of a great and commercial people, the Bankrupt Law for instance, *Attorney-General v. Stuart*, (3) and many other provisions are neither necessary nor convenient for them, and are therefore said to be not in force. What laws, however, shall be admitted, and what rejected, at what times and under what circumstances must in cases of dispute, be decided in the first instance by their own provincial judicature. This Colony, however, stands upon a much superior basis. The statute 9 George IV, c. 83, (a statute passed forty years after the foundation of a Colony, whose rapid progress in commercial prosperity has never been surpassed, or perhaps equalled in the history of the world,) enacts by the 24th section, that all laws and statutes in force within the realm of England at the time of passing of that Act (viz. : on 25th July, 1828,) shall be applied in the administration of justice in the Courts of New South Wales and Van Diemen's Land respectively, so far as the same can be applied within the said Colonies ; and in case of doubt as to the application of any such laws or statutes the local Legislature is thereby directed to declare whether they extend to the said Colonies, or to make such modifications as may be deemed expedient. Provided always, that in the meantime and before any such ordinances shall be actually made, it shall be the duty of the Supreme Courts, as often as any doubts shall arise upon the trial of any information or action, or upon any other proceeding before them, to adjudge and decide as to the application of any laws or statutes in the said Colonies respectively. Under this enactment the Court is now called upon to decide whether the consolidated Bankrupt Law of 6 George IV, c. 16, is so far applicable as to be in force in this Colony. "The matter of a law," says Dr. Taylor in his summary of the Roman law, "should be possible, reasonable and useful," and I think this rule may fairly govern the applicability of the English Bankrupt Law to this Colony. That the principles of the English Bankrupt Law could be usefully and reasonably applied to this Colony, I think it is manifest. The Judges of this Court in their letter of April, 1838, accompanying the draft of an Act for giving relief to insolvent persons, and providing for the due collection, administration and distribution of insolvent estates within the Colony, and for the prevention of frauds affecting the same," compiled by Mr. Justice Burton, state—"That the necessity of some such legislative provisions appears to them to be generally felt by the community, and instances have occurred within their knowledge, where

debtors and creditors have been driven to expedients and compromises, consequent upon the want of such a law, which have not always been lawful, or even just, as between the debtor and the general creditors." This letter goes on to say, "This measure is based upon so much of the English Bankrupt and Insolvent Laws, and the law of the code relating to cession of estates, as they (the Judges) deemed applicable to the state of the Colony." In a pamphlet in support of this proposed Bill written by Mr. Justice *Burton*, he makes this observation in the very outset "It" (viz. the proposed Act) "preserves, it is conceived, a perfect uniformity in principle with the English Bankrupt Law, where the objects of that measure have been effectually attained, and only departs from it in letter, where they may be attained in a more perfect degree." No doubt, therefore, can exist of the opinion of the Judges on this subject. The measure compiled by Mr. Justice *Burton* was proposed by His Excellency the Governor, and a Committee of the Legislative Council appointed to investigate the matter, and I find from the evidence of about thirty-eight witnesses, not more than two or three disputed the applicability of the principles of the Bill, as founded on the English Bankrupt Law, to this Colony; but the details of Mr. Justice *Burton's* proposed enactment, were for the most part greatly disapproved of. It may be well, however, with regard to the principle of the English Bankrupt Law, to state the evidence of two most respectable witnesses. Mr. *Thomas Walker*, a merchant (who, I rather think, has a partner in England), says, "Were this Bill to become law, I think it would tend to induce greater caution in giving credit, but I do not think it would operate prejudicially in giving legitimate credit. It might have the effect of checking wild and hazardous speculations, and I think it advisable." Mr. *James Norton*, a most respectable solicitor, of long standing, and perhaps of more practical experience than any other man in New South Wales, says in evidence given by him on the 2nd July, 1838, "I think paper credit has even extended to such an alarming amount in this Colony, that it is capable of deeply affecting the interests of the whole community; that the increasing number of Banking Establishments, and the increased, and increasing capital of those which have been long established, hold out so many inducements to fictitious and undue credit, that persons are led into speculations without any capital or means that would warrant them. I think these observations apply not only to persons who have been long resident in the Colony, and accustomed to its modes of credit, but also to those who daily arrive from England, who being unfettered by the conditions and circumstances under which credit is granted at home, are completely carried away by the facility with which they may obtain

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the means of entering into speculations here. I think this Bill will very beneficially abridge such credits, and bring not only the commercial, but all other interests into a more wholesome state." In all this, so far as my limited observations extends, I most cordially coincide; I may add also that the evils complained of have since greatly increased. Banking Companies, Loan Companies, Steam Companies, and Joint Stock speculations of various descriptions, are daily springing up in this hot-bed of enterprise. Mr. Justice *Burton's* proposed measure was not confined to traders, and in theory I prefer it to any other legislative provision for the same purposes I have hitherto seen; but as I have already said, the details of the measure were objected to in some degree or other by most of the gentlemen who gave testimony before the Committee. The session passed, and the Bill remained suspended, notwithstanding the representation by the Judges of the urgency of some such provision. In the December following, having occasion to communicate with the Executive, I thus expressed myself with regard to Mr. Justice *Burton's* proposed Bill, "I confess I was much disappointed at it not being passed, but when I find from the evidence which has been taken that there were such, and so many, objections as would render it distasteful to a great proportion of the community if passed into a law, I own I should feel very great reluctance in pressing it further. It has recently been decided by the Supreme Court that the English Bankrupt Law is not applicable to this Colony; but it seems to me that if a law were made on the same principle as the Order in Council of the 12th October, 1832, for regulating the practice and machinery in Bankruptcy at Gibraltar (*vide Clark's Colonial Law*, p. 690), there would be no further difficulty in the matter, and there would be this advantage, that instead of proceeding on an entirely new law, we should have one well known at home, and elucidated from time to time by English decisions. In my opinion, connected as this Colony is in all its trade with the mother country, it is worth some sacrifice perhaps (and I deem it a sacrifice to give up the Bill prepared by Mr. Justice *Burton*), in order that a branch of the law of such mercantile importance, should be equally understood in England as in this Colony." I have always believed that a law, to be useful, must accord in some measure with the feelings of those amongst whom it is to be carried into effect. I think it was in *Beilby's case*, but I know in some case or other, the majority, if not all the Judges of the Court, incidentally expressed an opinion that the English Bankrupt Laws were not applicable to this Colony, an opinion founded on my part on the ground that the means did not exist for carrying the Bankrupt Laws here, as in England, into execution. I admit that in expressing

this opinion I adverted to the Bankruptcy Court, a Court of statutory erection since the New South Wales Act, which does not exist here. But I certainly did not lose sight of the enactments of the Statute Geo. IV, c. 16. If however in any *obiter dictum*, aye, even in the most solemn decision, I should ever subsequently be convinced of having been in error, I will always be foremost in acknowledging and doing all in my power to correct any such error. But I think it will be found in the sequel that in the instance before us I have nothing to retract. In my communication with the Executive, which I have just stated, I adverted to the English Bankrupt Law and recommended its adoption, as in Gibraltar, when I found the details of Mr. Justice *Burton's* Bill were objected to, because, in the first place I bore in mind the importance of the following principle enforced by the Right Honorable the Colonial Secretary of State in 1831, in his circular dispatched to the Governors of certain Crown Colonies, viz., to the Governors of British Guiana, Trinidad, St. Lucia, and the Cape of Good Hope, transmitting to them the two Orders in Council and other documents dated 5th November, 1831, "That it has been a great error in the Colonial Policy of England to overlook the expediency of bending local peculiarities to the general principles of one common legislation," and I could scarcely suppose a more fit opportunity under the circumstances that had occurred, than that which thus presented itself, for uniting to the mother country by one common mercantile law, a part of the Empire which is deriving a vast proportion of its population and its commercial capital from Great Britain—I also bore in mind the vast importance to Colonial Judges of the benefit of the exposition, not only on the principles of a law, but of the exact law itself, by the Judges of England; for, with all deference and respect to my learned brethern, and for the office I have the honor to hold, I must say, that I prefer the elucidation of a law by the Sages of Westminster to anything that could be obtained elsewhere, even from the profound philosophy of another Minos, or from the righteous rigour of a resuscitated Rhadamanthus. But can we say of this or of any other Colony,

"Grossius haec Rhadamanthus habet durissima regna,

Castigatque auditque *dolos*?"

Virg. Aeneid, c. 6.

Moreover, in a matter of such importance, I freely admit that I greatly prefer the collective wisdom of the British Parliament to the more limited ideas, whatever those ideas may be, of any Legislative Colonial Council. "With the most perfect respect," said the Right Honorable the Colonial Secretary of State, in his circular despatch of the 5th November, 1831, to which I have already referred. "With the most perfect respect for the gentlemen who compose the Colonial Legislatures,

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I must venture to observe that the exact knowledge of the particular society in which a law is to operate, is not the only qualification for a legislator—it is not even the highest and most important. For so arduous an office, it is still more requisite that the lawgiver should possess the habit of dealing with large practical questions, a freedom from local and personal prejudices, an absence of all such personal interests as could warp his judgment; and a mind open to the admission of truth, in whatever direction it may come. Without supposing men resident in Europe to possess any superior capacity to persons of equal education and corresponding rank in life in the Colonies, I cannot think it unreasonable to believe that they possess in a higher degree the qualifications to which I have referred. A gentleman who has passed his life on a plantation in the West Indies, or in the legal tribunals of those colonies, may know much of the state of slavery, of which the most profound reasoners and the most practical statesmen in Europe are ignorant; but I cannot admit that this proximity of observation is an infallible or even a safe guide to sound conclusions. If the colonists know much of which others are ignorant, they are inevitably ignorant of much of what others know. They have few opportunities of studying the progress of public opinion throughout society at large—they unavoidably live in a contracted circle, which is agitated by petty feuds and pecuniary embarrassments. In those (the West Indian) Colonies, neither learned leisure, nor literary and scientific intercourse, nor even the more liberal recreations, are commonly to be found. The white inhabitants regard themselves as living in temporary exile, and are looking to a distant country as their home. The members of the local Legislature are contending for the maintenance of their own domestic and political authority, for the protection of their supposed and immediate interests, and in defence of their collective and personal reputation.” In all humility, and with all deference and respect, I think much of this despatch may apply to other Colonies than those to which it was specifically addressed; and as it was impossible to suppose, after the objections that had been urged, that the Bill compiled by Mr. Justice *Burton*, and recommended by the Judges, would pass the local Legislature in its original state, I trust it was not irrational or presumptuous to think, and that it is not so still to think, that an English Law, illustrated by the decisions of experienced English Judges, must be much preferable to any legislative provision which may be framed in New South Wales. The absence of any Colonial Law, and the rationality and utility of the principles of the English Consolidated Bankruptcy Law of stat. 6 Geo. IV, c. 16, being thus, I think, fully apparent, it only remains for

me to consider the possibility of its application. That it cannot be applied at present on the same ground as I formerly denied the applicability of the English Bankrupt Law, even when connecting it with the Act which provided for the new Bankruptcy Court in England, seems to me indisputable. I need only say that the stat. 6 Geo. IV, c. 16, is, with regard to the bankrupt, in some respects, a penal law; and that before a bankrupt could be duly convicted in any Criminal Court of Justice of offending against its provisions, it must be shown that the Act has been specifically complied with by those complaining against him. Thus, for instance, until an Office for registering proceedings in Bankruptcy, and a person to have the custody of such records, both which, by the 95th section of 6 Geo. IV, c. 16, the Lord Chancellor in England is authorised, and, therefore, the Judges here would, I think, be authorised to appoint, how could the following, the 96th section of the Act, which directs that no commission, adjudication, conveyance, or certificate shall be received in evidence, unless entered of record according to the preceding section, be complied with? Then have we yet a Master in Chancery? or any Masters Extraordinary for the purpose of administering oaths in Bankruptcy in the country? True, they may easily be appointed, but until such appointment, the words of the stat. 6 Geo. IV, c. 16, cannot be complied with. Then the *Government Gazette* should be substituted for the *London Gazette*; and there may be various other "Acts, matters, and things to be done in order that the said Act of Parliament may be carried into effect." How far my brother Judges may feel themselves authorised under the local Act of 6 Wm. IV, No. 12, or by virtue of their inherent powers, or any statutory authority they possess, to make good these deficiencies, and ordain such rules as will enable the stat. 6 Geo. IV, c. 16, to be forthwith legally carried into effect, I know not; but when I again revert to the letter of the Judges, of April, 1838, and find that, notwithstanding the necessity therein expressed of some provision in the nature of a Bankrupt Law, two sessions of the local Legislature have passed over and no such law has been enacted; when I reflect on the superiority of British to Colonial legislation in matters, I would say, so intimately connected not only with the commercial interests of New South Wales, but with the trade of the British Empire, when I consider how much more beneficial the exposition of a law by British Judges must be than what can be made by any Colonial Judicature, however talented its members; when, I say, all this is forced upon my mind by occurrences of the utmost importance for the community, I confess that I am decidedly of opinion that if my brethren can bring themselves conscientiously to believe that by any rules or orders of

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this Court, the means can be established for carrying the Consolidated English Bankrupt Act of 9 Geo. IV, c. 16, into effect in this Colony, we shall fail in our duty to the public and ourselves, if one moment be lost in making the requisite regulations. The date of such rules will be a period to start from, for the English Bankrupt Law cannot, I think, be considered applicable to this Colony, till the means are provided for carrying it into effect. The costs attending a Commission of Bankruptcy, according to the table prepared by the direction of Lord *Lyndhurst*, appear to me so reasonable and moderate that no valid objection can be made on that account. The table of costs to which I allude is given in the appendix to Lord *Henley's* work on Bankrupt Law, p. 180, and was prepared by my friend, Mr. *Beames*, and Mr. *Swanston* (both of whom must be known here as the authors of very valuable Chancery Reports), and by a Mr. *Metcalfe*. I would add that the fees payable to the Commissioner and Officers in Bankruptcy are given by statute, and our duty only is to say whether that statute be in force. This Court has, in my time, issued a Commission of Lunacy, and the Commissioners, I presume, were paid by fees, and yet I do not consider this as a taxation of the Colonists by this Court. On the whole I am bound to conclude that notwithstanding my conviction of the reasonableness, the utility, and applicability of the principles of the English Bankrupt Law, yet that until the necessary provisions be made for its practical execution, no Commission of Bankruptcy can legally be issued, and I am therefore bound, though with much regret, to reject the prayer of the petition.

STEPHEN, J. The other members of the Court having entered into this question so fully, it seems unnecessary for me to do more, than express in few words my acquiescence in their opinion, that the Bankrupt Law of 6 Geo. IV cannot be applied to this Colony. There are a few observations, however, which I wish to make, having regard to those two sections of the New South Wales Act, which were relied on in the argument,—*first*, as giving to this Court the powers of the Lord Chancellor, and *secondly*, as showing that the Bankrupt Law, though perhaps it could not have been applied when that Act was passed, may yet be in force now. From the latter of these positions, I must at once express my dissent. The question, whether any particular statute is in force, may be determined, as I apprehend, with reference to the date of the New South Wales Act alone. I cannot conceive that we are to determine the question, by nice enquiries, from time to time, as to the progress made by the Colony, in wealth or otherwise. Nor that our opinion is to be guided, by considering what is or is not *expedient*, or, which comes to the same thing, by

discussing what, at any given time, is or is not *beneficial*, for the Colony. Considering the wording of the section cited, I think that if a law could physically be applied, when that Act was passed, it was (as a general rule), intended that it should be. I do not go so far as to say, however, that a law was meant to be applied, if every way unsuited to the Colony; if in all respects, though it might easily be *applied*, it could be clearly shown to be inconsistent with our position and local circumstances. But, whatever exceptions the rule may or may not admit of, there seems no ground for holding, that the question of applicability was to have reference to the future. On the contrary, the meaning seems to me plain; that those laws only should compulsorily be applied, which *then*, at the passing of that Act, could be applied. For the future, as I conceive, a local Legislature was created; by which, statutes not then capable of application, were thereafter to be introduced either wholly or in part, as that body might determine. So that if the Bankrupt Law could not have been applied in 1828, it cannot, according to my opinion, be in force now. I think it material to bear in mind; because I take it to be clear, that, if this Court shall once determine any given statute to be in force, the Colonial Legislature can have no power to repeal, even if they had to amend it. So long as there remains a *doubt* whether a particular statute extends here, the Council may modify, and alter, or reject, at discretion. But the section appears to me to show that if there be no doubt that such statute does extend, their legislative functions are then at an end. As to the other section noticed by me, I confess that I think it questionable whether it does confer on us the powers supposed. It gives this Court all the powers of the Chancellor, which belong to him either in Equity, or at Common Law. But, the power of issuing a Commission in Bankruptcy, strictly speaking, is neither the one nor the other. It was and is a power given to the Chancellor, by statute; and (excepting that the Commissioners would, in such case, not be under the Great Seal), it might have been entrusted, as effectually, to any other officer. In exercising the power, indeed, the Chancellor was considered as bound to adjudicate on principles of Equity, though acting *quasi* as at Law. But, the power remained a statutable power notwithstanding. Without reference to this difficulty, however, enough has been cited from the Bankrupt Law by the *Chief Justice*, and also by Mr. Justice *Willis*, to show that, if a Commission issued here, it could not be worked out, for want of the necessary machinery. So that the Law cannot be applied now at all events. The result of this judgment is, I think, matter of congratulation. The length and apparent complication of the Draft Law, which

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1839. was last year submitted to the Legislature by the Judges, have been objected to. That Draft combines in itself, both the Bankrupt and Insolvent Laws of England; but it does not contain *one-half* the number of sections, which those Laws contain. The latter have 227 sections; the Colonial Draft has 102. This consideration, however, is comparatively of little importance. Instead of two discordant systems, opposed to each other in principle, and notoriously cumbersome, dilatory, and expensive, in practice, the Colony will possess one system, uniform, consistent, and intelligible; economical, and easy of execution; embodying the leading principles of the Bankrupt Law, which are of universal application, but extending them, for that reason, beyond traders to all classes of persons; a system, admirably adapted to our local circumstances, and in its details embracing nearly all the improvements, confessedly important, as they are numerous, met with in the Codes, to which the learned compiler of that Draft had recourse.

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Petition dismissed.

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Feb. 25.

Foreign Attachment—2 Will. IV, No. 7—"Possession or power"—Service of writ on a Company.

Dowling C.J.
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Goods were attached in the hands of a small number of the members in a certain partnership Company, by a writ issued against them individually, to satisfy the defendant's debt to the plaintiffs.

Held, that under sec. 5 of 2 Will. IV, No. 7, the writ was rightly served on the persons in whose power the goods were, without joining the other members of the Company (*per* the CHIEF JUSTICE and STEPHEN, J., WILLIS, J., *dissentiente*).

THIS was a point reserved by His Honor Mr. Justice *Willis* for the consideration of the other Judges, as to the sufficiency of the service of a writ of Foreign Attachment upon certain members of a joint stock Company, who had in their hands property of the absent debtor on behalf of themselves and the other members of the Company.

The judgments were delivered as follows :—

WILLIS, J. In this case, it appears to me that a great deal of useless argument might have been saved, if the question had been at once stated with precision and clearly understood. But in this, as in almost every other argument, it usually happens that much time is lost in referring to circumstances foreign to the purpose, and in maintaining propositions which are either not disputed, or whether they be admitted or denied, are entirely indifferent to the matter in debate—tending to perplex and confound with the endless subtleties of controversy—and by losing sight of the main question, rendering it more difficult to arrive at the truth. The consideration of what may be reasonable, or unreasonable, makes no part of this question. We are inquiring what the law is, not what it ought to be. To facilitate this inquiry, I will endeavour to clear the question of what appears to me to be foreign and indifferent matter, and then I imagine there is no one who will not be capable of forming his opinion upon it. The question then, in my mind, is simply this: goods are attached in the hands of a very small numerical proportion of a partnership or company; it is alleged, indeed, that the gentlemen against whom attachment is issued are trustees and directors of this partnership, but they are not so described in the writ, and, in my opinion, it matters little whether the

(1) *The Sydney Herald*, Feb. 28, 1840.

1840. fact be so or not, for it was admitted in evidence that the affairs of the partnership or company were subject to the control of the several shareholders or partners at their general meetings. The service of the attachment is not on behalf of those served and the other members of the partnership, but merely on those gentlemen individually. Now those who are served having, at the utmost, with regard to the goods, but a limited possession and a qualified power, during the pleasure of the majority of the partners, is this such a possession or power as to render the service legally sufficient under our Foreign Attachment Act? I am clearly and decidedly of opinion that such service is insufficient, and that it will be unjust to the parties served, and an abuse of the process of the Court should such service prevail. By the second section of the Foreign Attachment Act if the goods be removed from the hands of the garnishees, and the Sheriff make (as he must do), his return to that effect, the garnishees must make satisfaction to the plaintiff out of their proper estate, or be taken in execution. Now in the present case as the garnishees cannot hold the property against the will of the shareholders or partners expressed at any general meeting, they may be compelled, if this service is to be considered sufficient, personally to make satisfaction for that which has been proved to the Court is only in their possession or power jointly with others, and over which they do not possess such control as to enable them to keep it in their hands. Would it be just that Colonel *Shadforth* and Mr. *Edye Manning*, and the other gentlemen who have been served as individuals should be made liable to be taken in execution for £18,000, merely because the writ of foreign attachment was not so served as to comprehend the partnership and to those who in fact have the unqualified power over the goods? Yet such might be the case if this service be considered sufficient. Supposing I had in my possession a carriage belonging to *J. T. Wilson*, would any one suppose that service of a writ of Foreign Attachment on my coachman, when driving it away after leaving me here, would be good service? and yet he would have quite as much possession or power over the carriage as the gentlemen who have been served have over the steam-boats. Again, put the case of a common partnership of *A, B, and C*; surely service of a Foreign Attachment on *A*, as an individual, when the property is known to be in the hands of the partnership, and there has not been any attempt to serve the partnership, or the other members of it, ought never to be held sufficient service, regard being had to that justice to the garnishee, and jealousy of any abuse of its process, which a Court of Justice is, in my opinion at least, ever bound to exercise. Such, then, are my sentiments on this matter—what may be that of the other

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Judges, as yet I know not, but I will now request Mr. *Gurner* to read it; and as I have already, in compliance with the wishes of the parties, consented to adopt it in order to save expense, it must decide this case. It can, however, only be considered as the opinion of one Judge, and therefore will not preclude any ulterior proceedings on the ground of irregularity or otherwise, which the parties interested may be advised to take.

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The Clerk in Court then read the following, being the written opinions of the other Judges, forwarded to Mr. Justice *Willis* at His Honor's request:—

(The CHIEF JUSTICE.) His Honor Mr. Justice *Willis* having been pleased to reserve for the consideration of the other Judges, the question, whether it was not incumbent on the plaintiffs issuing the Foreign Attachment in these cases, to serve every member, of what was proved by parol, and not by writing, to be "The Steam Packet Company," I am called upon to certify my opinion upon the question so reserved. I own that when this case was first mentioned to me in private by the learned Judge, and under my then impression of the facts of the case, (without reference to the provisions of the Foreign Attachment Act), I thought His Honor's decision on the point was incontrovertibly correct. After hearing the question debated at the bar, and my attention being called to the provisions of the Act of Council, I am constrained to certify, that I cannot agree with my learned brother in his decision. I may not have a very correct apprehension of the facts of the case, inasmuch as they were stated from the memory of the learned Judge, and from some loose notes of the evidence taken by His Honor, but I take it to be conceded—First, that the plaintiffs in the actions proved their debts to the satisfaction of the Court.—Secondly, that the steam-boat which was attached, was the legal property of the defendant *John Thomas Wilson*, now out of the jurisdiction of the Supreme Court, and that the legal right of property was adjudged by the Court to be in the absent defendant.—Thirdly, (for the sake of raising the question), that the garnishees served with the attachments had in fact, possession of the steam-boat, but that they had not the entire control of the vessel, inasmuch as they were members of a Steam Packet Company, who, through their trustees, or managing committee, had contracted for the purchase of the steam-boat in question, but could not get their title completed by reason of the absence from the Colony of the legal proprietor. Assuming this to be a correct statement of the facts, necessary to raise the point, the question is, whether the persons so served with the

1840. - attachments, can be properly regarded as garnishees, over whom the Court has control, for all purposes with the intent and meaning of the Foreign Attachment Act, 2 Will. IV, No. 7. Whatever may be the alleged imperfections of the local ordinance, the Court must confine itself within the peculiar jurisdiction thereby conferred by its express provisions. The Court cannot mould or modify the Act to suit the exigencies of any particular case, not within the contemplation of the Legislature. It is obvious from the recital of the Act, that it is remedial for the benefit of creditors, and therefore must receive a liberal construction in furtherance of that object. This appears to have been a hostile proceeding solely against the debtor, and not against the holder of the debtor's property; and I apprehend that upon its being clearly determined that the goods in the hands of the garnishee, whoever he may be, whether a wrong doer or otherwise, the latter cannot make any resistance, but must surrender the property. In terms of the Act it becomes "bound in law to satisfy the debt of the plaintiff's debtor." The second section enacts,—that immediately from and after the service of the attachment the goods attached, shall be bound in law until the plaintiff's debt or demand shall be satisfied. Upon the return of the attachment, the only duty cast upon the Court by the 5th section (after it has been adjudged that there is a debt due from the defendant to the plaintiff) is, to enquire whether the goods attached do belong to the plaintiff's debtor, and for such purpose any person in whose hands the goods shall be attached, may be summoned before the Court, and upon appearance shall be interrogated respecting the same, and upon refusing to appear or, upon appearing, shall refuse to answer, may be dealt with as for contempt, and the Court may then proceed to inquire *ex parte* touching the goods. In this section the rights of the garnishee are not at all contemplated; the sole question contemplated is, whether the goods attached are in his possession or power. This is an alternative proposition. If the goods are in his possession, the attachment binds them, and the like consequences follow if they are only in his power, whether wholly or partially. By what means or under what circumstances,—whether on his own account, or on account of himself jointly with others, seems to be wholly immaterial so long as it appears that he has in fact the possession, and the goods are adjudged to be the property of the debtor. The 6th section is in effect, a continuation of the 5th, and proceeds to enact, that if the person in whose hands the goods are attached, shall confess, or if after due inquiry it shall be determined by the Court, that the goods do belong to the plaintiff's debtor, the Court shall order the same to be held subject and liable to the plaintiff's debt or demand and to be
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taken in execution for the same; but if it be doubtful, whether they do belong to the debtor, or if the person in whose hands they are attached shall desire that the matter may be more fully investigated, the Court may order the matter to be tried by a jury. In the present case it appears, that the steam vessel in question, was determined by the Court to be the property in law of the debtor *Wilson*, and the garnishees have not desired that the matter might be more fully investigated. It follows therefore, that if the persons in whose hands the goods are attached have been duly made garnishees, execution must follow for the same. The garnishees do not appear to have, nor do they claim any property in the vessel, nor in fact is any objection made on their part to the service of the attachment. They have respectively appeared,—have been examined,—admit the possession, but under the qualifying circumstances that alone, they have not the entire control over the property, because they are members of a company or partnership. The existence of the company or partnership, has not been duly proved, and the Court is ignorant of the terms and articles by which the company or partnership are to be governed between themselves. But even if the Court were fully informed of these particulars it appears to me, that they would be wholly immaterial for the purpose of this proceeding, in reference to the provisions of the Foreign Attachment Act, which contemplates a bare possession, or control over the goods in the hands of the person or persons served with the attachment. It is conceded that service of the attachment, upon *A, B*, “and others his partners” would be sufficient, but it does not appear to me, that this would help the difficulty if the objection were tenable, for the partners might come in and contend that they were not served, and knew nothing of the attachment. I cannot see how the other members of the company (if there be such a company) can complain, or have a right to complain, or interfere in any way in the proceeding. Neither can I see how the Sheriff could be damnified, after it has been once determined, as it has been in this case, that the vessel is in law the property of the plaintiff's debtor. The adjudication of that fact “binds the goods in law in the hands of the garnishee,” and will exclude all other persons, except the debtor himself, who is protected from any injustice, by the provisions of the 7th section, which require the plaintiff to give security before execution goes against the goods, to restore the value of them, if within three years the defendant comes and disproves the plaintiff's debt or any part thereof. Notwithstanding the sincere respect I have for the opinion of my learned colleague, I am, in the absence of any objection on the part of the garnishees themselves, and of any proof of collusion, or manifest injustice likely

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Having been detained in Court till this late hour, and understanding that this paper is desired by eleven o'clock to-morrow, I am unable to do more than express shortly a concurrence in the opinion of His Honor the *Chief Justice*, that the possession of the property is, for the purposes of the Act, sufficiently in the present garnishees; and that, consequently, there being no question as to the ownership being in the absent defendant, the attachment ought to be sustained.

24th Feb., 1840.

ALFRED STEPHEN.

NATHAN v. LEGG. (1)

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*Arrest on meane process—3 Vic., No. 15—Application for discharge—Affidavits.**May 22.**Burton J.
and
Stephen J.*

Defendant having been held to bail under 3 Vic., No. 15, on suspicion that he was about to remove from the Colony, and discharged on giving the Sheriff a bail-bond, afterwards, on the ground of insufficiency of the affidavit, obtained an order from the Judge, that the bail-bond should be delivered up to be cancelled on the first day of term, unless the Court should otherwise order. On application by the plaintiff to discharge this order, *held*, that though the Court *might* have no express power to grant the discharge under the Statute in question, yet it still retained its power under the former law.

The Court *will* examine the affidavits to see that the cause of action is certainly stated.

In this case an affidavit had been made by the plaintiff, stating that in September last, he had shipped twelve cases of goods on board the defendant's ship the *York*, then in the Thames, bound for Port Phillip and Sydney; and that of these cases ten had been delivered, that two of them were yet undelivered, that the plaintiff had applied to the defendant since the arrival of the ship at Sydney for the delivery of those cases, and had tendered him the freight for the same, that the defendant had referred the plaintiff to his agents, Messrs. Dunlop & Co., to whom the plaintiff paid the freight, but that the defendant would not deliver the said cases, that the same contained goods worth £400, and that an advertisement had been published in a Sydney newspaper, stating that the ship would shortly sail for Calcutta, and that, therefore, the plaintiff believed the defendant was about to remove himself out of the jurisdiction of the Court. Upon this affidavit the defendant had been held to bail by *Stephen J.*, on the 26th April, under the 3 Vic., No. 15; having given the sheriff a bail bond, he was then discharged from custody, and on the 30th April he, on the ground of insufficiency of the affidavit, obtained an order from *Stephen J.*, that the bail bond should be delivered up to be cancelled upon the first day of the term, unless the Court should then otherwise order.

The plaintiff now sought to discharge this order.

Foster and *Broadhurst* for the plaintiff. The Statute 3 Vic., No. 15, does not warrant the order as section 5 only gives power to discharge

(1) *The Sydney Herald*, May 26, 1841.

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the party out of custody, not to cancel the bail bond, and having given the bail bond the party is no longer in custody. Some new fact must be alleged to empower the Judge to set aside his order.

Windeyer for the defendant, refers to the old law of arrest. This Statute takes nothing from the power of the Court, it is only cumulative.

[*Stephen, J.* In *England*, the party must show a probable cause; *here*, he must show cause satisfactory to the Judge.]

The judgment of the Court was delivered by *Burton, J.*

BURTON, J. It is clear that the local Act was intended to protect the debtor, and not to entrust the creditor with unlimited power. Everything in the affidavit should be stated with certainty, under this Act, which could be required under the old law of arrest. Facts should be stated with certainty and precision, and principles should be clearly ascertained which may be applicable to all cases. The 5th section of 3 Vic., No. 15, provides that the defendant may apply *for his discharge* at any time after his arrest; but it has been argued that the party must apply to the Court *before* giving a bail bond, and that the only power in the Court is to discharge the party from custody, instead of delivering up the bail bond to be cancelled, and it has been said, that in the civil cause, by giving the bail bond, a party is discharged from custody; but although this *may* be true, of, and applicable to the 3 Vic., No. 15, in consequence of the omission in it of any express provision giving the Court a power of cancelling the bail bond, yet the Court is not crippled by this Act, for it still retains its power under the former law, and under that law, if the party were improperly arrested, the Court would discharge him. The Court *will* examine the affidavit, and see that the cause of action is certainly stated. This is an action for non-delivery of certain cases, and it should appear from the affidavit *what* the cases contain; the particulars of the goods should be stated; besides, there is no sufficient statement that the party is about to remove out of the jurisdiction of the Court, the advertisement is not sufficient, for it is not stated by whom it was inserted, or that it was inserted by or with the cognizance of the defendant; it is merely argumentative, whereas, it should show satisfactory grounds for the plaintiff's belief that the defendant intended to abscond? it is insufficient, and the defendant ought not to have been arrested upon it. Therefore, let the bail bond be delivered up to be cancelled; but, as this is a novel and important question, let it be without costs.

Application granted.

Ex Parte HALLETT (1).

1841.

Habeas Corpus—Defective Warrant of Imprisonment—Presumption that an Act of the Supreme Court is regular.

Aug. 2.
Burton J.
and
Stephen J.

On a return to a writ of *habeas corpus*, that prisoner was detained by an order of the Supreme Court, *held*, that the Court was bound to consider that he was duly imprisoned, and that the fact of that order having been set out irregularly in the return, was no ground for directing the prisoner's discharge. To entitle a person under such circumstances to be discharged from custody, the order must be first set aside by proceedings in the nature of a writ of error. Commitments of a Court of Record need not be in writing.

MOTION to discharge a prisoner on the return to a writ of *habeas corpus*.

Windeyer, for the prisoner. Nothing can be more defective than the writ by which the prisoner is detained. It is not addressed to anyone, nor signed by anyone purporting to have authority; it is a mere naked memorandum, showing no offence, mentioning no Court ordering the imprisonment, not stating when the imprisonment is to end, or any cause for its commencement. *Hulton*, p. 121. The word "insolvent" is used, but the Insolvent Act only provides for imprisonment for certain periods. The warrant must contain particulars. *Chitty's Burns' Justice*, p. 766. The writ cannot now be amended.

The judgment of the Court was delivered by *Burton, J.*

BURTON, J., said, that he was of opinion that the cases cited by the learned counsel for the prisoner were clearly distinguishable from the prisoner's case, because those cases referred to commitments by Magistrates who were bound to make their commitments in writing and under seal, whereas the commitment of a Court of Record need not be in writing; and this distinction was laid down in the 1 Lord *Hale*, and in 1 *Sulkeld*, page 348. In the prisoner's case it was returned that he was imprisoned by an order of the Supreme Court, and therefore the Court was bound to hold that he was duly imprisoned by the Court, for if the prisoner were imprisoned by an order of the Supreme Court, the fact of that order having been irregularly set out in the return to the writ, was no ground for directing the prisoner's discharge. If the order for the imprisonment were erroneous, the prisoner should resort to a writ of error, or to something analogous to that proceeding;

(1) *The Sydney Herald* (Supplement), 4 August, 1841.

1841. for as long as it was stated, on the return, that he was in custody under an order of the Supreme Court, the Judges would be bound to presume that he was legally in custody, until that order was set aside, because the order might be perfectly valid, though the clerk might have informally prepared it. If the Sheriff or gaoler heard an order from a Judge to take a party into custody, it was his duty to execute that order without requiring any further authority, for the order of a Judge did not require to be in writing. If the order were imperfect or expressed no lawful cause of imprisonment, then an imprisonment under such an order would be illegal; but to entitle a party to be discharged from custody, who was in custody under the order of a Judge, that order should be first set aside, for it was to be presumed that a Judge would not make an order without cause. If the prisoner was an insolvent debtor, then he was in lawful custody, in execution without any other or further warrant, and as the return expressed that he was in custody under an order of the Supreme Court, he should be remanded to that custody.

Ex parte
HALLETT.

Burton J.

Windeyer inquired how the order could be obtained or brought before the Court, as there was no *certiorari* into the Supreme Court, and no writ of *error* from it.

BURTON, J., said, that the order or an office copy of it should be taken out, and that the prisoner should proceed to set aside the order by some method analogous to the writ of *error*.

Ex parte HUNTER. (1)

1842.

Writ of fi. fa.—Order to officer of the Court to pay money—5 Vic. No. 9, sec. 43.

Jan. 22.
Dowling C.J.
Burton J.
 and
Stephen J.

The Judges, suspecting a breach of duty in an officer of the Court, who had charge of certain sums of money, ordered him to pay over the same to another officer, and in default of such payment authorised the issue of writs of *fi. fa.* against him under sec. 43 of 5 Vic. No. 9. On application to set the writ aside,

Held, that the case fell within the mischief contemplated by the statute, and within the words of the section, but, *semble*, a case *primæ impressionis*.

MOTION to set aside certain writs of *fi. fa.* In this matter, the Judges, having found that Mr. *Manning*, an officer of the Court, had a large sum of money, forming part of the estates of various intestates, in his hands, had ordered him to pay it into the hands of Mr. *Elyard*, a clerk of the Court. This not having been done, several writs of *fi. fa.* were issued against the late Registrar, by the direction of the Court.

Windeyer, for the applicant, to set aside the said writs. The Act does not justify the order of the Court. The order is defective in particulars, and, moreover, was issued on a holiday.

The CHIEF JUSTICE said their Honors were of opinion that Mr. *Windeyer* could only take a rule to show cause on one of the grounds submitted by him in the course of his motion, and that was, whether the order which their Honors had issued to Mr. *Elyard* in the case of Mr. *Manning* was one which could be considered to be warranted by the Act of the Legislative Council. This seemed to be the only material point for consideration, the defects which had been enumerated by Mr. *Windeyer* being mere matters of irregularities of which, Mr. *Manning*, perhaps, against whom the writs had been issued, might have taken advantage, but which were amenable irregularities as objected to by third parties, like Mr. *Hunter*. Mr. *Windeyer* might therefore take his rule *nisi* on the single ground which had been mentioned by His Honor.

BURTON, J., concurred in the judgment of His Honor, the Chief Justice, that Mr. *Windeyer*, could only take his rule on the single ground that had been mentioned by that learned Judge. At the same time he felt obliged to say that he thought it hardly fair for learned

1842. gentlemen to insinuate that their Honors had in this matter evinced
Ex parte any partiality, or the slightest dereliction of what their consciences
 HUNTER. told them was their strict duty. Their oaths of office, and their sense
 of duty to the Queen and the public, alike forbid any such departure
 Burton J. from the pure administration of Justice. Their Honors the more felt
 such an insinuation coming from members of the Bar, as to *them*
peculiarly, as men of honor, and capable of entertaining a due appre-
 ciation of it in others, their Honors naturally trusted for a vindication
 of conduct, which by the less informed might be suspected, because
 not understood. Their Honors, in treating the application in the way
 they had done, had acted strictly, they conceived, as became their duty,
 to the absent and the helpless. No one could more sincerely regret
 than did the Judges the misfortune which had called for the issuing
 of the order which had been complained of, but that misfortune
 having occurred, it became imperatively the duty of their Honors to
 take every precaution, that the monies of widows and orphans in the
 hands of Mr. Manning, as an officer of their Court, should be properly
 protected. His Honor, however, felt that one of the grounds Mr.
Windeyer had taken, viz., that the order in question was not such a
 one as could be protected by the Act of the Legislative Council,
 entitled him to a rule *nisi*, and therefore he concurred with his Honor,
 the *Chief Justice*, in granting one accordingly.

STEPHEN, J., stated that he entirely concurred with his learned
 brothers, that a rule *nisi* could be granted only on the single ground
 that had been mentioned by them.

Rule nisi granted.

Jan. 29.

On application to make the rule absolute,

The *Attorney-General* showed cause. The Act on which the order
 is issued is partly founded on 2 Vic., cap. 110. It is not necessary
 that the order in question should be an order in a cause.

The *Solicitor-General*, *Foster*, and *Broadhurst* on the same side.

Windeyer in reply. The Act does not expressly take away the
 common law. The rules and orders mentioned in the Act mean such
 as are obtained in the usual course of practice, *judicial* orders, not
 such as are issued by the Court ministerially. The Act cannot be
 supposed to have contemplated the Court issuing such an order, and
 even if its words sanction it, it is void on the principle that no man
 can be a judge in a matter in which he has any concernment.

Fisher on the same side.

The Court said that the case had been most ingeniously argued, but that they did not think there had been anything shown in the course of it which could be taken to impeach the order in question. They would have reserved the matter for consideration if they had had any doubt about it, but they would not reserve it, lest it should be supposed there was any doubt in their minds, when in fact there was none. Their Honors thought they would have been guilty of a dereliction of that duty and trust imposed on them by Parliament, had they not interfered with their order in the way they had done, to prevent the grievous wrong which would otherwise have been inflicted on the absent and the helpless. It had been said that the order was a ministerial one, and that the Judges were interested, but here the Judges, seeing a breach of duty in their officer, in virtue of their office, it became at once their duty to order that officer to pay over the money to ensure its safety. It was conceded their Honors had authority to make the order on their own officer, and he being answerable in his person, did not the Act of Council apply in his case, and instead of issuing an attachment, enable the Court to reach his property? If this be so, the order was within the intent and meaning of the local ordinance. If it were not so, Mr. *Manning* might, so to speak, snap his fingers at the Court. The order had been made after mature consideration and a full hearing of the matter at issue. Mr. *Manning* had admitted having received the monies, and that they were not forthcoming, monies not his, but committed to his trust, as a man of honour and integrity, holding a high and distinguished office in the Court, and it was upon that admission that it became the duty of the Court to interfere and enforce its order, as if it were a judgment at law. If the order were not lawful *cadit quaestio*. Certainly every order was not intended by the Act, but only such orders as the Court had power to make. Their Honors could not consider whether the Legislature contemplated, or knew the extent of the words they used, and it was probable they did not, but if in every case the Legislature were to be questioned respecting its intentions, the answer would probably be very unsatisfactory. The order was an order of the Court, and their Honors did not think any order of the Court could be ministerial; and it mattered not, whether such order as the one in question had been contemplated by the Legislature or not, if it fell within the words of the enactment. The case was within the mischief contemplated by the Act, and before the passing thereof, the order could have been enforced by attachment. It had been said, that the Act could only mean a judicial act, where there was an actor or defendant. They granted that this was the usual course of judicial

1842.

Ex parte
HUNTER.*The Court.*

1842. orders, but there were many cases in which the Court might be a moving party, and it be a legal order, there was no occasion for any other party to intervene. It was true no such case had occurred in England, but it was equally true, that if such an one had arisen, the Court of Queen's Bench would have compelled their officer by attachment. This enactment, which was more beneficial than any that had been made for a long time past, enabled them instead of an attachment to issue a *fi. fa.* If this had really been the Judge's own case, the authorities cited by Mr. *Windeyer* would have been applicable. But the monies were not theirs, but those of parties, who were placed under their protection ; and therefore the order was properly issued.

Ex parte
HUNTER.

The Court.

Rule discharged with costs.

[TRIAL AT BAR.]

HALL v. PAWLEY. (1)

1842.

Special jury—Tales de circumstantibus.

July 29.

Dowling C.J.
Burton J.
and
Stephen J.

Under the Colonial Jury Act (2) a *tales* is not limited to trials at *nisi prius* at the assizes.

TRIAL at Bar before the three Judges, and a special jury. On calling the list, it was found that three jurymen were absent.

Winder, for the plaintiff, submitted that they were entitled to a *tales de circumstantibus*, as the Colonial Jury Act did not limit such a *tales* to trials at *nisi prius* at the assizes, as the English Jury Act did; but, if the Court should be of a different opinion, he prayed for an adjournment to such days as the Court might think convenient, and for an award of a *decem* or *octo tales*, returnable the same day.

The COURT held that the plaintiff was entitled to a *tales de circumstantibus*.

(1) *The Sydney Morning Herald*, Aug. 1, 1842.

(2) 4 Vic. No. 28, sec. 4.

1843.

CANNON v. KEIGHRAN. (1)

Jan. 24.

Pretence titles—32 Hen. VIII, c. 9, sec. 2—Married woman.

Dowling C.J.
Burton J.
 and
Stephen J.

The Act of Parliament 32 Hen. VIII, c. 9, is applicable to the present circumstances of the Colony, and is therefore in force, notwithstanding it has not been formally adopted by the Colonial Legislature. A nonsuit was properly entered on the ground that the plaintiff was a married woman, though not pleaded by the defendant.

THIS was a *qui tam* action brought by the plaintiff, *Mary Cannon*, to recover possession of an acre and a half of land at Campbelltown. The action was based upon sec. 2 of 32 Hen. VIII, c. 9, which renders it penal to sell land or a title thereto, until the seller has been one year in legal possession of the same.

It appeared that the land had originally belonged to W., who sold to S., from whom B. afterwards purchased it. The plaintiff claimed the land as representative of B., W. however, afterwards obtained from the Crown a grant in his name, and conveyed to the defendant, who thereupon recovered in ejectment, about three months after the date of the grant.

At the trial before *Burton J.* and a Special Jury, Aug. 26, 1842, the *Solicitor-General*, *Foster* and *Broadhurst* with him, for the defendant, applied for a non-suit, upon the following among other grounds, viz.: 1st, that the plaintiff was a married woman, and 2nd, that the present form of action was not maintainable here, the stat. of Henry VIII not being in force in the Colony.

Burton, J., directed a non-suit on the first ground, and at the same time ordered that the second ground should be included, if the matter should come before the Court again, that the point might be solemnly argued.

On the matter being argued before the Full Court on January 24, 1843,

The Court was of opinion that the non-suit had been properly directed by the learned Judge, that the Act of Parliament under which the action had been brought, although not formally adopted by the Colonial Legislature, was notwithstanding this applicable to the present circumstances of this Colony, and therefore its non-adoption was no bar to the action.

(1) *The Sydney Morning Herald*, Aug. 29, 1842, and Jan. 25, 1843.

In re PEEK. (1)

1843.

Insolvent Act—5 Vic., No. 17, secs. 43 and 94—Certificate—Signatures of three-fourths of the creditors—Foreign creditors.

April 20.

Dowling C.J.
Burton J.
and
Stephen J.

The Chief Commissioner having allowed twelve months for the English creditors of the insolvent to come in, under sec. 43, of the Insolvent Act, and three-fourths in number and value of the Colonial creditors having given their consent to the issue of a certificate under section 94, the insolvent applied before the expiration of the twelve months for his certificate, after giving all necessary notices, &c.

Held, that sec. 94 is mandatory on the Court to issue the certificate.

CERTIFICATE APPLICATION BY AN INSOLVENT. The facts appear in the judgment of the Court, which was delivered by—

The CHIEF JUSTICE. This insolvent applied before me on the 15th March, for the allowance of his certificate, under the provisions of the 94th section of the Insolvent Act, 5 Vic., No. 17, under the following circumstances:—He had creditors both in this Colony and in *England*. Three-fourths in number and value of his colonial creditors had signed. Twelve months had been allowed by the Chief Commissioner, under the 43rd section, to the English creditors, to come in and prove their claims, either personally, or by attorney. The twelve months have not elapsed, and none of the English creditors have yet come in; and the question is, whether before the expiration of the twelve months thus given for the English creditors to come in, the insolvent is entitled to apply for the allowance and confirmation of his certificate under the 94th section. He had complied with the provision of that section, by giving six weeks' notice of the day of his application, by advertisement in the *Government Gazette*. No objection had been made thereto by any of the colonial creditors, and the English creditors have not had time to make any objection if they were so minded.

The 94th section is silent as to English creditors, but speaks generally of *creditors*, and authorises the insolvent, after the *third public meeting of his creditors*, called by the Chief Commissioner, and after his examination, to apply to his creditors for a certificate; and stipulates that he shall give *six weeks' notice* of his application for the allowance, by advertisement in the *Government Gazette of the Colony*. Under the 43rd section, the Chief Commissioner has taken order for securing the

(1) *The Sydney Morning Herald*, March 16, and April 24, 1843.

1843. amount of the English creditors' debts, in case their claims should be
In re established within the time limited for coming in. The 94th section is
 PEEK. *mandatory* on the Court to allow the certificate, if no objection be made
 Dowling C.J. thereto by any of the creditors of the insolvent.

It was contended, in support of the application, that the insolvent came within not only the words, but the spirit and meaning of the 94th section. First, as to the words: it speaks of the insolvent being at liberty, "after the *third* public meeting of his creditors, called by the Commissioner, and after his examination, to apply to his creditors for a certificate testifying their consent to his discharge"; and having gotten the signatures of three-fourths in number and value, and made oath of the particulars required, may apply for the allowance of the certificate by the Court, after *six weeks' notice* by advertisement in the *Government Gazette*. All this language is of local application to the exclusion of creditors *absent from the colony*. If the words had a more extended application, and could be construed to include *all* his creditors, whether local or foreign, the insolvent could not apply for his certificate in conformity with the provisions of the section. Foreign creditors could not attend the *third public meeting*, or be expected to attend; and what would be the use of six weeks' notice, by advertisement, in the *New South Wales Government Gazette*, to creditors *living out of the Colony*? It is obvious that the whole section is local in its terms, and is confined to creditors residing in *New South Wales*, who may be more competent to judge of the insolvent's eligibility for a certificate than creditors living abroad. Secondly, he is within the spirit and meaning of the clause, because the Legislature by the 43rd section has made provision for protecting the claims of persons absent from the colony, who have not proved their debts, but may eventually be able to establish them, by authorising the Commissioner to make order for securing the amount thereof in case they should be afterwards established. This has been done in the present case, so that the absent creditors cannot be damnified. This shows that the absent creditors were never contemplated in the certificate clause. It never could be the intention of the Legislature to postpone the certificate of a man who has given up everything to his creditors, and has obtained the consent of three-fourths in number and value of his local creditors, and leave him to starve for twelve months, to wait the event of his absent creditors objecting to his certificate, when *non constat*, that any of such creditors will ever come in and prove at all. It is notorious that in many cases, even known creditors decline coming in, and surely in such a case, this clause ought to receive a liberal construction in favour of an honest insolvent, who has satisfied those who must be more conversant with his

conduct that he is worthy of a certificate, even if the clause were doubtful in its terms. If the intention of the Legislature had been to include absent creditors within the 94th section, it is *casus omissus*—and not being *expressed*, the insolvent must be held to come within the words and meaning of the section. If the Act requires amendment in this particular, it is for the Legislature to interfere, and the words of the section cannot be extended in their meaning by *construction*.

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PEEK.*Douling C.J.*

In deference to the opinion said to have been privately intimated by His Honor Mr. Justice Burton, "that the insolvent had no right to apply for the allowance of his certificate until the lapse of twelve months, allowed to the English creditors to prove their debts, because, if *non-allowed*, they would be excluded from having any voice in the matter," I reserved my opinion until I had an opportunity of conferring with my learned brethren on the point. In my opinion the certificate ought to be allowed, for the reasons urged in support of the application, and unless my view of the matter is overcome by the arguments *contra*, I must adhere to that opinion.

BURTON, J., and STEPHEN, J., concurred.

Issue of insolvent's certificate ordered.

1843.

Ex parte ASHTON. (1)

May 18.

Mandamus—Electoral Lists—Court of Revision—6 Vic. No. 16.

Dowling C.J.
Burton J.
 and
Stephen J.

An application having been made to the Court of Revision under the Electoral Districts Act, 6 Vic., No. 16, to place a certain person's name on the voters' list, the Magistrate sitting therein refused the claim, on the ground that the written notice required by the Act was not produced, or a written copy thereof. A *mandamus* to the Magistrate to reconsider the matter, or to the Clerk of the Revision Court to enter the name of the applicant on the Electoral Lists was refused by the Supreme Court, on the ground that the Act of Council had made the Revision Court the sole court of appeal.

THIS was an application for a *mandamus*, calling upon the Magistrates and assessors of Windsor to assemble for the purpose of reconsidering the claim of *Thomas Ashton* to have his name inserted in the electoral lists, or commanding *G. T. Wyatt*, the Clerk of the Court of Revision, to insert the name of *Thomas Ashton* in the list, as a person entitled to vote at the election of members of Council for the *Cumberland Boroughs*. It appeared from the affidavits that *Thomas Ashton* then resided, and had resided for one year and ten months, in a dwelling house in *Lennox-street, Windsor*, of the clear annual value of £20; that he had had notice of his claim to vote in respect of this qualification duly served upon *Wyatt*, the Clerk of the Court on the 22nd day of April, and that the notice was, in substance, in accordance with the form and spirit of the Statute. In pursuance of the notice of claim, he attended the Court of Petty Sessions for the revision of the electoral list, on the 6th of May, and was examined by the Magistrates adjudicating, and proved his qualification. But, although the service of notice was admitted by the Clerk to be in his possession, and to have been served within the time, the Magistrates refused to insert his name, unless a written copy of the notice was produced in Court, and proved. Parol evidence of the notice was refused.

Purefoy, Windeyer, and Fisher for the applicant. The objection is frivolous. Is the applicant to suffer from the neglect of the Clerk? He has been deprived of his right to vote. When a wrong has been done it must always be assumed that it should be put right. Although the Court of Queen's Bench has not power to exercise a jurisdiction such as this, since a superior jurisdiction, that of the Houses of Parliament, exists for that purpose, here the only Court of Appeal is the

(1) *The Sydney Morning Herald*, May 19, 1843.

Supreme Court. The Electoral Districts Act 6 Vic., No. 16, secs. 12, 13, 15, 16, 19, and 44, *Reg. v. the Mayor of Lichfield* (2) ; *Rex v. the Bishop of Chester* (3).

1843.

Ex parte
ASHTON.

Dowling C.J.

The *Solicitor-General* and *Foster contra*. The qualification of the applicant has not been made out. A *mandamus* to reassemble a Revision Court would be in direct opposition to the Act of Council which has defined the time beyond which such Revision Court cannot sit.

THE CHIEF JUSTICE. The Court has no jurisdiction to order the Clerk of a Revision Court to enter any name on the Electoral Lists, and even if it had it would be necessary for the Court to go into the question of qualification. The Clerk is a mere ministerial functionary, acting under the directions of the Magistrates.

BURTON, J., concurred.

STEPHEN, J. The Court has no power to direct the Revision Court to hold another sitting, for the purpose of taking into consideration the applicant's claim. The decision of such matters lies with the Court of Revision alone, by the Act of Council.

Application refused with costs.

This having been a test case, and several parties being interested, the Court, afterwards, on the motion of *Foster*, allowed costs against those parties who had taken part in the application, without having given notice to the Court of Revision.

(2) Gale & Dav. 28.

(3) 1 Durn. & E. 404.

1844.

REGINA v. KNATCHBULL. (1)

Feb. 1.
 Dowling C. J.
 Burton J.
 and
 Stephen J.

Effect of English repeal of English Statutes previously in force in New South Wales by 9 Geo. IV, c. 83—9 Geo. IV, c. 31—4 and 5 Will. IV, c. 26 and 6 and 7 Will. IV, c. 30, adopted by 8 Will. IV, No. 2—Dissection or hanging in chains of criminals executed for murder.

The statute 9 Geo. IV, c. 31, which came into force in this Colony solely by virtue of the New South Wales Act 9 Geo. IV, c. 83, gave to the Court a discretionary alternative power to direct that the body of every offender should, after execution, either be dissected or hung in chains "as to the Court should seem meet."

The 2 and 3 Will. IV, c. 75, not here adopted, directed the body to be buried within the precincts of the prison, or to be hung in chains, and abolished dissection.

By 8 Will. IV, No. 2, *inter alia* were adopted 4 and 5 Will. IV, c. 26, and 6 and 7 Will. IV, c. 30.

The former repealed hanging in chains and various provisions of certain Irish statutes, and enacted that bodies of persons executed in *Ireland* should be buried within the precincts of the prison, &c.

The latter provided that from and after the passing of that Act, sentence of death might be pronounced after convictions for murder, in the same manner as after convictions for other capital offences.

Held, that a sentence of death pronounced in this Colony upon a prisoner found guilty of murder, without any order for dissection of the prisoner's body, or that it should be buried within the precincts of the prison, was right.

Reg. v. Hartnett (2) distinguished.

On the 24th of January the prisoner was convicted of wilful murder, at the gaol delivery of the Supreme Court, before *Burton J.*, who in pursuance of the statute 6 and 7 Will. IV, c. 30, sec. 2, immediately pronounced sentence of death upon the prisoner, in the same manner as after convictions for other capital offences. After the close of the sessions of gaol delivery, namely, on the 29th January, a petition was presented to the Judge, on behalf of the prisoner, praying that counsel might be heard before all the Judges, for the purpose of arguing that the sentence was illegal, inasmuch as it was omitted to express, that the body of the prisoner should be dissected and anatomised; and if that was not necessary, that it omitted to express, that the body of the prisoner should be buried within the precincts of the prison.

(1) *The Sydney Morning Herald*, 2nd Feb., 1844.

(2) *Jebb's Irish C.C.*, 1841, p. 302.

The judgment of the Court was delivered as follows:—

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The CHIEF JUSTICE (after stating the above facts) said: Having submitted this petition to the consideration of my brethren, we have fully considered the propriety of yielding to the prayer, and are of opinion that it ought not to be granted.

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v.
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Dowling C.J.

If the question as to the proper manner of pronouncing sentence in this colony, in cases of murder, were now for the first time to be mooted, the Court would have readily acceded to the request to have it argued by Counsel; but inasmuch as the Judges of this Court had this point expressly under their deliberate judgment and determination, so long since as the 9th November, 1837, in the case of *John Carey Willis*, holding that sentence of death may in this colony be pronounced after convictions, in the same manner as after convictions for other capital offences, and that resolution having been invariably acted upon by all the Judges, in at least seventy subsequent convictions for murder, the Court cannot now have the question reopened for argument.

On the 13th July, 1837, a local ordinance (8 Will. IV, No. 2) was passed, adopting in the gross, and without discriminating what were, and what were not, applicable to the state of this colony, several Acts of Parliament for applying the same in the administration of justice in New South Wales, "in like manner as other laws of England are applied therein." Amongst these were the 4 and 5 Will. IV, cap 26, for abolishing the practice of hanging the bodies of criminals in chains, and the 6 and 7 Will. IV, c 30, for repealing so much of the English Act, 9 Geo. IV, c. 34, as directs the period of the execution, and the prison discipline of persons convicted of the crime of murder. As both these Acts made material alterations in the manner of passing sentence and disposing of the bodies of persons convicted of murder in England and Ireland respectively, it became a question for the resolution of the Judges, as to the applicability of them in this colony. These Acts having been adopted on the 13th of July, 1837, the first case of murder which occurred afterwards was that of a convict named *John Carey Willis*. That prisoner was tried before Mr. Justice *Burton*, on the 9th of November, 1837, and being convicted, His Honor invoked a conference with Mr. Justice *Willis* and myself, as to the form and manner of awarding sentence; and after full deliberation we were of opinion, upon the plain construction of the Statute 6 and 7 Will IV, c. 30, s. 2, that the sentence of death might be pronounced after conviction for murder, in the same manner as under convictions for other

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capital offences, namely, by simply awarding judgment of death and execution thereon, without directing any disposition of the bodies after execution. That prisoner was so sentenced accordingly. The same point was again considered in the case of *George Comerford*, convicted on his own plea of guilty before myself, on the 28th May, 1838. As already observed, this resolution has been invariably acted upon down to the present time, and we think the soundness of it ought not now to be called in question. It may be convenient, however, to advert shortly to the grounds on which the Judges came to their resolution.

By the 9 Geo. IV, c. 31, which came into operation in this colony, solely by force of the New South Wales Act 9 Geo. IV, c. 83, a discretionary alternative power was given to the Court to direct, that the body of every offender should, after execution, either be dissected or hung in chains "as to the Court should seem meet." By the 2 and 3 Will. IV, c. 75, entitled "*An Act Regulating Schools of Anatomy*" (which Act has not been adopted by the local Legislature), the power to order *dissection* is repealed, and it gives the Court the alternative power to direct the prisoner either to be *hung in chains*, or to be buried within the precincts of the prison in which such prisoner *shall have been confined after conviction*, as to such Court shall seem meet.

Then the 4 and 5 Will. IV, c. 26 (which has been adopted), reciting the English Act 9 Geo. IV, c. 31, the Irish Act, 10 Geo. IV, c. 34, and the 2 and 3 Will. IV, c. 75, relating to schools of anatomy, repeals the hanging *in chains* ordained by the 9 Geo. IV, c. 31 (*dissection* having repealed by the preceding Act 2 and 3 Will. IV, c. 75), and also repeals that part of the Irish Act 10 Geo. IV, c. 34, which awarded dissection or hanging in chains, and proceeds to enact, "That in every case of conviction in *Ireland*, of any prisoner for murder, the Court before which such prisoner shall have been tried, shall direct such prisoner to be buried within the precincts of the prison within which prisoner *shall have been confined after conviction*, and the sentence to be pronounced by the Court shall express that the body of such prisoner shall be buried within the precincts of such prison." Then by the 6 and 7 Will. IV, c. 30, reciting the English Act 9 Geo. IV, c. 31, and the Irish Act 10 Geo. IV, c. 34, certain provisions therein contained as to the time and manner of passing sentence, and the treatment of prisoners after conviction for murder, are repealed, and then it is enacted, "That from and after passing of this Act, sentence of death *may be pronounced*, after conviction for murder *in the same manner*, and the judge shall have the same power, in all respects, as after convictions for other capital offences."

Now, as the 9 Geo. IV, c. 31, only came into operation in this colony by operation of the New South Wales Act, 9 Geo. IV, c. 83, (as a statute in force prior to the passing of the latter Act), and as the alternatives of dissecting or hanging in chains, given by that statute are now repealed, and are no longer part of the sentence in cases of murder in England—there is no longer any alternative direction to be given, and all reason for the introduction of any direction whatever in the sentence has ceased.

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That part of the directions of the Act 2 and 3 Will. IV, c. 75, for regulating schools of anatomy, which directs *the body to be buried within the precincts of the prison*, remains untouched, and still continues part of the law of England, but that Act has not been adopted by our local Legislature. So that the only part of the Act 4 and 5 Will. IV, c. 26, which could be construed to apply to this colony, is the 2nd and only section which says, that in every case of conviction for murder, in Ireland, the Court before which such prisoner shall have been tried, shall direct such prisoner to be buried within the precincts of the prison within which such prisoner shall have been confined after conviction, and the sentence to be pronounced by the Court shall express that the body of such prisoner shall be buried within the precincts of such prison.

This clause is expressly confined to Ireland, and applicable to Ireland only. This is an English colony, governed either by English laws, passed before the 9 Geo. IV, c. 83, or which have since been adopted by the local Legislature, or by local laws ordained for local purposes. No doubt the adopting Act, 8 Will. IV, No. 2, after reciting that and other Acts on different subjects, enacts, "That every clause, provision, and enactment, therein respectively contained, shall be, and the same are, and is hereby adopted and directed to be applied in the administration of justice in the said Colony and its dependencies, in like manner as other laws of England are therein applied." If the School of Anatomy Act, 2 and 3 Will. IV, c. 75, which still retains the direction, *to bury the body in the case of murder committed in England, had been adopted by the local Legislature*, it might have been adopted in this colony *in like manner as other laws of England are therein applied*. But a law applicable to Ireland by name, cannot be said to be an *English law* and applicable in like manner as other laws of *England* are therein applied. At all events, the point was so doubtful, and in the absence of any adopted law of England, authorising interment within the precincts of the gaol, the Judges felt themselves bound by construction, to give effect to plain language of the 6 and 7

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Will. IV, c. 30, which places the manner of passing sentence after convictions for murder, on the same footing as convictions for other capital offences.

Dowling C.J.

In *Jebbs's Irish Crown Cases*, (1841,) p. 302, it was held in *Reg. v. Hartnett and another*, that the omission, in pronouncing sentence on a conviction for murder in Ireland, to order that the bodies of the prisoners should be buried within the precincts of the gaol, as directed by 4 and 5 Will. IV, c. 26, s. 2, was held to be illegal, notwithstanding the 6th and 7th Will. IV, c. 30, s. 2. In that case Lord *Denman*, Chief Justice of the English Queen's Bench, in a letter to the Lord Chief Justice of Ireland, certified, that "though no case had come regularly before the Judges in England on the point in the case stated, yet his Lordship had no doubt that they would come to the same decision as that which had taken place in Dublin. Two years before his Lordship passed a sentence with the same defect, and found so strong a doubt of its legality prevailing among the Judges, that it seemed prudent to recommend a commutation of the sentence. "Certainly in England," said His Lordship, "no sentence for murder will omit hereafter to include a direction for burying the convict's body."

Entertaining as we do unbounded respect and reverence for the opinions of the Judges both of England and of Ireland, the decision referred to seems not to us to be *ad idem*, even though promulgated long after this resolution of the Judges of the Court in 1837, immediately after the adoption of these Acts. In England, by the 2nd and 3rd Will. IV, c. 75, burying within the prison was made obligatory, but *that* Act not being adopted by our Legislature, it was considered of no force here as a law of England.

The decision of the Irish Judges were upon the 4 and 5 Will. IV, c. 26, which in terms, prescribes the forms of sentences for convicted murderers in Ireland. Assuming, however, that by force of the adopting Act 8 Will. IV, No. 2, that the provision for Ireland could be administered in the colony in like manner as "other laws of England are therein applied," it being, in fact, a law for Ireland only, still the present case does not fall within the grammatical construction of the clause relating to Ireland. The sentence of death was in this case pronounced *immediately after conviction*, and before the prisoner left the bar. Now, the section in question directs that "the Court before which such prisoner shall have been tried, shall direct such prisoner to be buried within the precincts of the prison within which such prisoner *shall have been confined after conviction*." If the sentence be pronounced immediately after conviction, this direction would not apply,

for the section extends only to cases where the prisoner *shall have been* confined in some prison "after conviction." Should, therefore, sentence be pronounced *immediately after conviction*, and the prisoner, shall not be confined in gaol after conviction and before sentence, then by unavoidable construction, there would be no prison precincts within which to direct him to be buried. Without, however, dwelling on so critical a construction, it appeared to the Judges, that, as *dissection or hanging in chains*, provided for by 9 Geo. IV, c. 31, had been severally repealed by the 2 and 3 Will. IV, c. 75 and 4 and 5 Will. IV, c. 26, respectively, and there being no *English* law adopting the direction that the culprit should be buried within the precincts of the prison, the Judges were compelled to resort to the general clause contained in the 6 and 7 Will. IV, c. 30, sec. 2, and hold that the sentence of death for murder in this colony might be pronounced in the same manner as in other capital cases.

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In coming to this decision, they were not influenced by any consideration of the ameliorated state of the law of England by the repeal of the ignominious part of the sentence, which ordained either dissection or hanging in chains;—nor by a sense of the obvious inconvenience of burying the dead bodies of criminals within the precincts of gaols in this hot climate, and still less by any reference to the necessity, however imperious, which frequently arises, of directing the execution to take place, for the sake of example, as near as possible to the scene of atrocity. They went upon the plain language of the adopted English Act, 6 and 7 Will. IV, c. 30, s. 2. From the construction they have put upon that Act, they see no reason now to depart, or even allow a discussion which could only bring in question a course of justice which has been undeviatingly pursued for nearly seven years, without objection, although many of the miserable culprits towards whom this course has been pursued were ably defended by counsel learned in law.

Application refused.

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REGINA v. MANN. (1)

Feb. 5 and 12.
Dowling C.J.
Burton J.
and
Stephen J.

Justices—3 Vic., No. 9, sec. 44—Form of conviction—Local and territorial jurisdiction—2 and 3 Ph. and Mary, cap. 18—Certiorari, affidavits in support of—7 Geo. IV, c. 48, sec. 17.

The Statute 3 Vic., No. 9, sec. 44 (2), does not give the Justices power to convict summarily.

The Court can intend nothing in favour of a conviction, and the record of conviction must distinctly show that the justices not only had jurisdiction in the matter, but that they proceeded on competent evidence.

The Justices, having been appointed by a general commission of the Peace, to act as Justices of the *territory*, and a subsequent general commission having issued, whereby certain gentlemen were assigned to be justices for *the City of Sydney and the adjacent County of Cumberland*, under the provisions of the Sydney Corporation Act (1842) (3), *held*, that it was thereby intended to supersede so much of the territorial commission, as previously included Cumberland as a portion of the territory, and that the before-mentioned territorial justices had no jurisdiction in the county of Cumberland. This principle is recognised by the stat. 2 and 3 Phillip and Mary, cap. 18.

Notice of one of the grounds for the motion to quash a conviction not having been given in the affidavit in support of the *certiorari*, *held* that this was not necessary, as there was no provision to that effect in the Colonial Statutes, and 7 Geo. IV, c. 48, sec. 17, was not in force here.

Feb. 12.

THE facts in this case appear in the judgment of the Court which was delivered by—

THE CHIEF JUSTICE. The defendant was summarily convicted by two Justices in penalties for keeping an unlicensed spirit still, contrary to the local ordinance, 3 Vic. No. 9. The conviction having been returned by *certiorari* into this Court, it was moved, on the 5th instant, by defendant's counsel, that it be quashed: First, for want of *summary* jurisdiction; second, for want of general jurisdiction in the Justices; and, thirdly, for want of form, in not showing that the penalties were sought to be enforced at the instance of a proper party.

The first and last of these objections were founded on the construction of the local ordinance, 3 Vic., No. 9, s. 44; and the second on affidavit that the offence was committed out of the jurisdiction of the convicting magistrates.

(1) *The Sydney Morning Herald*, Feb. 6 and 14, 1844.

(2) Repealed by 13 Vic., No. 27.

(3) 6 Vic., No. 3, sec. 64.

It was objected by the Attorney-General, that the first ought not now to be entertained, even if tenable, inasmuch as notice was not distinctly given of it in the affidavit on moving for the *certiorari*, in pursuance of the English statute for "altering and amending the several laws relating to the Customs," 7 Geo. IV, c. 48, s. 17.

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Had that Act been in force in this Colony, and applicable to a case of this kind, most undoubtedly such an objection could not have been allowed to be taken by the defendant, unless it had been stated in the affidavit for the *certiorari*, but as that Act is not in force, and as there is no similar provision contained in the Act on which this conviction was founded, the Court is not at liberty to exclude it from consideration.

It is true that the objection occurred to the Court itself, upon reference to the clause in the local ordinance, which purports to give jurisdiction to the justices, but though not taken by the defendant's counsel until pointed out, the Court could not resist the force of a difficulty which went to the very foundation of the authority of the magistrates.

What then is the objection? By the Local Act, 3 Victoria, No. 9, s. 41, it is enacted, "That all fines, forfeitures, and penalties, imposed by this Act may be recovered before *any two Justices*, or the Judges of the Supreme Court, or in the Court of Vice Admiralty, of the said Colony." There is here no jurisdiction given to the Justices to proceed in a *summary* manner, and consequently their jurisdiction could only be after the manner of proceeding in the Supreme Court, or in the Court of Vice Admiralty, neither of which Courts has any summary jurisdiction for offences against the Act. The conviction shows, that the Justices below have exercised only summary jurisdiction as judges of the law and of the fact; and therefore, it is obvious that they had no authority to proceed in that manner. It is a first principle, that the examination and punishment of offences in a summary manner by Justices of the Peace, out of their sessions, and without the intervention of a jury, or of an open trial, are founded entirely upon a special authority, conferred and regulated by the Legislature. No new offence is cognizable in that manner, unless expressly made so by an Act of the Legislature; and all the proceedings under an authority so created must be strictly conformable to the regulations prescribed by the special law in each instance, from which their force is derived. *Payley* 1. It is too plain for argument, that these Justices had no summary jurisdiction to convict, and consequently, their proceedings were wholly void.

1844. The objection to the form of the conviction is, that it does not show
 REGINA that the penalties have been imposed *at the instance* of the party
 v. pointed out by the Legislature. By the 44th section, the penalties
 MANN. imposed by the Act are to be recovered "at the instance of any
 Dowling C.J. *Inspector of Distilleries, or any superior officer of the Customs.*" Now
 it is not shown by the record of conviction at whose instance the
 proceedings were had. All that it says is, that the defendant "was
 duly convicted before the Justices upon an information in that
 behalf exhibited before them," without saying at whose instance.
 It is true that in awarding a distribution of the shares of the penalty,
 one moiety is to be paid to the Colonial Treasurer for the use of
 Her Majesty, to be applied to the public use of the Colony; and
 the other moiety "to be paid to *Robert Cassels*, the person having
 sued for the said penalty." Who *Robert Cassels* is does not appear:
 whether he be an Inspector of Distilleries, or a superior officer of
 Customs, or a common informer, is left uncertain. Although it be
 a rule that the Court can intend nothing in favour of a conviction,
 and will intend nothing against it—*Rex v. Hazell* (4),—yet all the
 authorities hold that the record of conviction must distinctly show
 that the justices have not only jurisdiction in the matter, but that
 they proceeded on competent evidence. It is clearly settled, and
 cannot now be questioned, that the informer himself cannot be a
 witness, unless made so expressly by the Act, wherever he is entitled
 to the whole or any share of the penalty on conviction. Here the
 Act says, that the penalties are to be recovered at the instance
 of any Inspector of Distilleries, or any superior officer of the Customs;
 and by the 50th section it is declared that such persons or their
 assistants, shall be deemed competent witnesses, notwithstanding they
 may be entitled to the penalties. No authority is given by the Act to
 enforce penalties at the instance of a common informer, and *non constat*,
 but these penalties were imposed at the instance of a common informer,
 and that the conviction was founded upon his evidence. We cannot
 come to the conclusion by *intendment* that they were not so imposed.
 It must be made to appear on the conviction that they were not so.
 We think the conviction ought to have shown that the Justices were
 set in motion at the instance of an Inspector of Distilleries, or of a
 superior officer of the Customs, the only persons pointed out as the
 responsible prosecutors for penalties before the Justices; and having
 failed so to do, the conviction is defective on that ground.

The remaining, and perhaps the more serious, objection taken is,
 that supposing any Justice of the Peace to have a summary jurisdiction

to convict under the Act, and that the formal objection ought not to prevail, yet these gentlemen had no jurisdiction as *territorial magistrates of New South Wales*, to convict for an offence alleged to have been committed in the county of Cumberland.

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By the record of conviction, the magistrates are described as "two of Her Majesty's Justices of the Peace in and for the said colony," and the offence is stated to have been committed "at a certain house and premises situate near the City of Sydney, in the parish of Alexandria, in the county of Cumberland in the colony aforesaid."

It is now sworn that the names of these Justices are included in general Commissions of the Peace, issued by His Excellency the Governor, in the name of Her Majesty, prior to January, 1843, to act as Justices, either alone, or in conjunction with other Justices, assigned *before* to act as Justices of this territory; but, that on the 2nd day of January, 1843, a general commission, under the hand of Sir *George Gipps* and the seal of the colony, was issued, whereby certain gentlemen therein named, were assigned, by Her Majesty, to be Justices for the City of Sydney, and the adjacent county of Cumberland, in the said colony; and that the names of neither of the convicting Justices appears in that general commission, and that no subsequent commission has issued in which the names of these gentlemen are included as Justices for the county of Cumberland. It is further sworn, that this conviction took place at Parramatta, which is within the county of Cumberland.

By the Sydney Corporation Act, 6 Victoria, No. 3, s. 64 (1842), it is enacted, "That it shall be lawful for the Governor of New South Wales for the time being, or person administering the Government, from time to time to assign to so many persons as he shall think proper, the Commission of the Peace to act as Justices of the Peace in and for the said city, as well as for the adjoining county, or for any more or less extensive jurisdiction which the said Governor may deem it proper to confer. Provided always, that the persons so appointed shall be resident within the city, or 7 miles thereof, and that no unpaid magistrate be so appointed who is not qualified to be a citizen of the said city, and to act as such in elections under the provisions of this Act."

The language of this Act would import that a power is given to the Governor of his own authority and in his own name, to assign commissions of the peace for persons to act as Justices for the city of Sydney, as well as for the adjoining county of Cumberland. It appears, however, that His Excellency has not exercised the power so enacted; but by the General Commission of the 2nd January, 1843,

1844. Her Majesty has assigned certain gentlemen to act as Justices for the
 REGINA city of Sydney and adjacent county of Cumberland, under which it is
 v. sworn by certain gentlemen by name have acted as Justices both in
 MANN. and out of sessions in the city of Sydney.
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The substantial objection then to the jurisdiction of the convicting Justices is, that the General Commission of the 2nd of January, 1843, for the city and county of Cumberland, in which their names are not included, had the effect, *quoad* the county of Cumberland, of ousting their jurisdiction over offences committed within that part of the territory, and the question is, whether, in law, the Commission for the city and county had not the effect *ipso facto* for superseding *pro tanto* the General Commission under which these gentlemen acted as territorial magistrates. On consideration, we are constrained to hold, that the Commission for the city of Sydney and the adjoining county of Cumberland, had the effect of excluding the jurisdiction of these gentlemen as territorial magistrates, in taking cognizance in Cumberland of offences committed within that county. It is true that the Commission assigning the Justices for the city of Sydney and county of Cumberland does not contain any *ne intromittant* clause, and therefore it was contended, from analogy, to the cause of *chartered* corporations, that the jurisdiction of the territorial Justices could not be ousted without *express words*; and the cases of *Blankley v. Winstanley* (5), and *Rex v. Sainsbury* (6), were cited, and it was insisted that at all events the territorial Justices had a concurrent jurisdiction with the city and Cumberland Justices; but the reasoning referable to the construction of *charters* does not hold, when applied to mere commission issued at the pleasure of the Crown, and which may be determined, at the will of the Crown, and without cause assigned. There is this obvious distinction between county magistrates nominated directly by the Crown in a general commission of the peace, and magistrates of chartered towns, that when the Crown issues a charter of incorporation ordaining that the Mayor and Aldermen elected by the inhabitants shall *virtute officii* be magistrates of the town. The inhabitants have, in effect, the power of nominating their own magistrates, and if there be nothing in the charter in derogation of the rights of the Crown, or it contains no *ne intromittant* clause, there is nothing to prevent the Crown from issuing a commission to other magistrates by name, *including* the town within their general jurisdiction. Here the local and the territorial Justices derive their authority respectively by name from the Sovereign.

The object of the commission for the City of Sydney and county of Cumberland must, if it meant anything, have been to give exclusive jurisdiction to the local justices over offences committed within the prescribed locality—else why should such a commission be issued? It could not have been intended to create a conflicting jurisdiction, and give to both the local and territorial magistrates, respectively, a concurrent jurisdiction over offences committed solely within the local division of the territory.

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It is a general rule, that all commissions issued at the pleasure of the Crown, unless otherwise expressed, are determinable by the like expression of the Royal will. The power that created these justices may discharge them by the simple issuing of a new commission, having the effect of superseding their authority. That part of the commission under which these gentlemen acted, which would cover the county of Cumberland, as part of the territory of New South, before the local commission was issued, ceased to be operative in the county of Cumberland, that county having been carved out of the territory as an exclusive jurisdiction for local offences. The General Territorial Commission, it may be observed, contains no such power as is contained in Commission of the Peace in England, "*to act for the territory as well within local jurisdiction as without,*" and the simple point is, whether the issuing of the new commission for the local purposes of the City of Sydney, and the adjacent county of Cumberland, does not *ipso facto* amount to a repeal of so much of the Territorial Commission as had theretofore included every part of the territory. Even if there were no authority for holding the affirmative, the point would appear to require no express decision. It might be tested by principle, and governed by the incontrovertible position, that the issuing of a new commission for the same purposes or object by the *same authority* supercedes any previous commission for the like purpose or object, unless the contrary is expressed in new commission. Mr. Justice *Blackstone*, *Com.*, Vol. I, p. 353, observes that "as the office of these Justices is conferred by the King, so it subsists only during his pleasure," and is determinable in several ways. Among others enumerated by the learned commentator is, "By a new commission, which virtually, though silently, discharges all the former Justices that are not included therein, for two commissions cannot subsist at once." This very position has been recognised and declared as incontrovertible by Parliament. The statute 2 and 3 Phillip and Mary, c. 18, after reciting that commissions had been theretofore directed as well to mayors and other inhabitants of corporate towns, *not being counties in themselves*, as also unto other persons dwelling out of the towns corporate, for

1844. keeping the peace within the same towns, and for delivering the gaols there ; and that after granting such commissions, their Majesties had granted divers other like commissions unto certain worshipful and other learned men of the shires, &c., for the conservation of the peace, and also delivering the gaols of their shires, &c., and which commissions so bearing a later day have been a *supersedeas* and clear discharge unto all and singular, the said former commissions granted unto the said towns corporate, so that the mayor, &c., had been charged to sue for the renewing again of such commission, both for the peace and gaol delivery, to the great expense of the said mayor, &c., and to the great delay of justice in the meantime—proceeds to enact—that a commission of the peace and gaol delivery for a shire, &c., shall not be a *supersedeas* to a former commission granted to a city or town corporate, not being a county of itself.” This is clearly a legislative affirmation of the principle on which we are compelled to act in determining that the territorial Justices had in Cumberland no jurisdiction ; although here the converse of the principle so recognised comes into operation.

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We are bound to hold from the fact of a new commission being issued by Her Majesty for the City of Sydney and county of Cumberland, that it was thereby intended to supersede so much of the territorial commission as previously included Cumberland as a portion of the territory. We must collect this to be the intention from the language of the commission. If a commission, for instance, issues in 1841, and a new one issues in 1842, omitting names which were contained in the first, it must be taken to be a clear, though silent intimation that the persons omitted are no longer magistrates. By the same rule of construction, we apprehend it must be held that when Her Majesty, in 1843, issued a general commission, and thereby authorised other persons not being territorial Justices, to act in and for a limited portion of the territory, it was intended to supersede *pro tanto* the jurisdiction of the territorial justices by the local general commission. If the conclusion be right, that the issuing of a new commission for the whole territory absolutely supersedes an old one, it follows, from parity of reasoning, that a new commission for a portion of the territory to other magistrates, not being territorial magistrates, must be taken as an intended determination of the authority of territorial Justices to act within the limited jurisdiction.

On all the grounds taken we are of opinion that the conviction must be quashed.

Conviction quashed.

Ex parte PEARCE. (1)

1844.

Information by common informer—Recovery of penalty—No power to sue given by Act—2 Vic. No. 18, secs. 74 and 80.

Feb. 16.
Dowling C.J.
Burton J.
and
Stephen J.

Where a statute gives a penalty to a particular party, it must be construed to give him a right to sue for it, although no such right is given in *express terms*.

Fleming q. t. v. Bailey (2) is not an authority against this proposition; the observations there made to the contrary effect are but *obiter dicta*.

MANDAMUS.

IN this case a rule *nisi* had been obtained calling upon *Charles Windeyer* and *Thomas Broughton*, Esquires, two of Her Majesty's Justices of the Peace for the City of Sydney, to show cause why they had refused to adjudicate in an information preferred by Mr. *Pearce*, one of the officers of the City Police, under the provisions of the Publicans' Licensing Act, 2 Vic. No. 18.

The Justices had refused to proceed with the case, on the ground that they were of opinion that a common informer was not authorised to exhibit such an information.

Michie, for the applicant, moved to make the rule absolute.

Windeyer, for the magistrates, showed cause.

The Act gives no power to sue. *Fleming q. t. v. Bailey* (2)

Michie, in reply. *Beilby v. Scott* (3)

Cur. adv. vult.

On April 15 the judgment of the Court was delivered by—

The CHIEF JUSTICE: During the last term the Court granted a rule *nisi* for a *mandamus* to be directed to *Charles Windeyer* and *Thomas Broughton*, Esquires, two of Her Majesty's Justices of the Peace, in and for the city of Sydney and county of Cumberland, commanding them to hear and determine, at the instance of a *common informer*, an information against one *Thomas Stone*, for selling spirituous liquor without being duly licensed, contrary to the local Ordinance, 2 Vic. No. 18. The Justices had refused to proceed with the case on the ground that they were of opinion that a common informer was not authorised to exhibit such an information. The application was stated to have been

(1) *The Sydney Morning Herald*, Feb. 17, April 17, 1844.

(2) 5, East, 315.

(3) 7, M. and W., 93.

1844. made, not in a hostile spirit, but rather with the concurrence of the
Ex parte Justices, who were anxious to have the question determined by the
PEARCE. adjudication of this Court. On showing cause against the rule nisi, it
Dowling C.J. was contended that as the local Ordinance, 2 Vic. No. 18, did not in
express terms, give the right to a common informer to sue for the penalties incurred by the Act, the Justices had no jurisdiction to hear and determine an information at the instance of a common informer.

The question arose upon the construction of the 80th section of the Act, by which it is enacted, "That one moiety of all fines and penalties paid and received by virtue of this Act, shall go to the use of the party or parties informing, and suing for the same, and after payment and deduction thereof, all other sums of money, collected, levied, or received, under and by virtue of this Act, shall be paid into the hands of the Colonial Treasurer, and be appropriated to the use of Her Majesty, her heirs, and successors, for the public uses of the said colony, and the support of the Government thereof."

This is the only clause in the Act bearing upon the point raised, except the 74th section, which enacts, that all offences against the Act shall be heard and determined in a summary way, according to the law in force for the time being, regulating summary proceedings before Justices of the Peace, "*except only where some other special course of proceeding may be directed by this Act.*" On referring to the Summary Jurisdiction Regulating Act, 5 William IV, No. 22, we do not find any express provision authorising common informers to sue for penalties. It contains a general clause (s. 6,) enacting the manner in which penalties imposed shall be distributed; but does not, except by implication, point out that a common informer may sue for them. That section will not therefore aid the construction of the special course of proceeding directed by the 2nd Victoria, No. 18, section 80, which we are now called upon to interpret. The question is, whether we are bound by necessary implication and intendment to hold, that inasmuch as the 80th section says, that one moiety of all fines and penalties paid and received (that is when paid and received,) shall go to the use of the party informing and suing for the same, it is a common informer who may sue; or in other words,—inasmuch as a common informer has a right to receive the moiety of the penalties when paid; he has equal right to set the Justices in motion and demand the infliction of the penalties.

The case of *Fleming. q. t. v. Bailey* (4), (and which appears to have influenced the Justices below in refusing to entertain the information)

was cited as an express authority for holding that a common informer cannot *sue* for, though he may *receive* a moiety of the penalty when paid, under the local Act.

1844.

Ex parte
PEARCE.
Dowling C.J.

In the case referred to, a common informer brought a *qui tam* action, for three several penalties of £20 each, for a violation of the Printer's Act, 39 Geo. III, c. 79. By the 35th section of that Act, any penalty exceeding £20, may be sued for by any person, in any Court of Record at Westminster, and any penalty not exceeding £20, should and might be recovered before any Justice of the Peace. The plaintiff in that case sought by *cumulative* penalties of £20 each, to bring the case within the jurisdiction of the King's Bench; but the Court held, that as the statute only gave a common informer a right to sue in a Court of Record, when the penalty *exceeded* £20, the jurisdiction of the King's Bench was ousted, and the plaintiff by seeking to recover *cumulative* penalties, did not come within the privilege of suing in a Court of Record. The plaintiff's counsel endeavoured to maintain that the jurisdiction of the King's Bench was not ousted; whereupon *Lawrence, J.*, said, "a common informer cannot sue at common law; therefore you must show some clause in the Act giving him a power to sue in this *particular case*." The counsel then referred to the 36th section which enacts, "That all pecuniary penalties imposed by this Act, when *recovered* either by action in any Court, or in a summary way before any justices, shall be applied, one moiety to the plaintiff in any such action, or *the informer before any justice*, the other moiety to the King." Upon this *Lawrence, J.*, observed, "That only applies to the penalty *when recovered*, but does not give the informer *the original power to sue for it*"; and Lord *Ellenborough* said in giving judgment, "A common informer can have no right to sue for any penalty but where *power is given to him for that purpose by the statute*."

If the case cited had turned upon the question, whether the informer could sue before justices for penalties not exceeding £20, and the Court had held in the negative we might have felt ourselves bound by the decision; but the only point in judgment was, whether, as the informer sought to recover *cumulative* penalties of £20 each, he had a right to recover in a Court of Record; and the Court held that he had not, because the power of so suing was not expressly given. The observation thrown out by Lord *Ellenborough, C.J.* and *Lawrence, J.*, were with reference to *that point only*, and cannot be regarded as a decision on a point not before the Court, and which it was unnecessary to determine. At the utmost, supposing what was thus thrown out by the Judges would be applicable to the question raised in this case, they were

1844. incidental observations, and must be regarded as *obiter dicta*. We
Ex parte have been unable to find any case in which *Fleming v. Bailey* has been
 PEARCE. recognized as an authority for anything more than what the Court
 Dowling C.J. then decided, namely, that suing for *cumulative* penalties of £20 did
 not give the informer the power of suing in a superior Court of Record.
 We cannot therefore extend that case beyond what the Court plainly
 intended. In the modern case, *Beilby v. Scott* (5), which was a *qui tam*
 action for penalties under the 70th section of the Pilot Act, 6 Geo. IV,
 c. 125, one of the questions raised, was whether, under the 83rd section,
 the plaintiff had a right to maintain the action as a common informer.
 By that section, "one third of all fines or penalties *to be levied*, in pur-
 suance of the Act, shall go to the person who shall inform or sue for the
 same," &c., and the Court intimated a clear opinion, that the action was
 properly brought by a common informer ; although the judgment of the
 Court in the defendant's favour turned upon the substantial question
 arising on the construction of the Pilot Act. In that case, *Fleming v.*
Bailey was not even alluded to ; and it is scarcely to be believed that
 it would have escaped the research of the counsel, or of the Court, if it
 could be deemed an authority for holding that the common informer
 could not sue because the right of suing was not given in express terms.
 There being no authority to support the very strict interpretation of the
 local Act contended for, we must resort to the received principle (which
 has been acted upon in innumerable instances), that where a statute
 gives the penalty to a particular party, it must be construed to give
 him a right to sue for it. In *Hawk, P.C.*, lib. 2, c. 25, s. 17, it is thus
 laid down : "Where a statute gives any part of a penalty to him who
 will sue for it, by action or information, &c., I take it to be settled, at
 this day, that any one may bring such action or information, and lay
 his demand *tam pro domino rege quam pro seipso*." In this case, the
 local Act says "that one moiety of all fines and penalties *paid and*
received by virtue of this Act, shall go to the uses of the party or parties
informing, or suing for the same, &c." Now it appears to us, that by
 the plain intendment, and necessary construction of this clause, the
 Legislature gave to the party entitled to *receive*, the right to *demand*
 his portion of the penalty. The rule must therefore be made absolute
 for the *mandamus*.

Rule absolute.

Ex parte DEEDO. (1)

1844.

Mandamus—Adjudication by Magistrate or dismissal—Effect of adoption of English statute expressly declared not to apply to a colony having a Legislative Assembly *Feb. 16.*
 —7 Vic. No. 21—5 and 6 Will. IV, c. 19—House of Assembly and Legislative *Dowling C.J.*
Assembly. *Burton J.*
and
Stephen J

Sir James Graham's Act, 5 and 6 Will. IV, c. 19, by sec. 54, "shall not intend or apply to any ship registered in or belonging to any British colony having a Legislative Assembly, or to the crew of such ship, while such ship shall be within the precincts of such colony, &c."

This statute was undoubtedly in force in New South Wales until 5 and 6 Will. IV, c 76, which established a Legislative Council.

Held, that this Legislative Council was a Legislative Assembly within the meaning of Sir James Graham's Act.

By the local Act, 7 Vic. No. 21, after reciting (sec. 17) that "it is expedient to remove doubts as to whether the statute 5 and 6 Will. IV, c. 19, be now in force in the colony of New South Wales"; it is in the gross "Declared and enacted that that Act is and shall be in force and operation in this Colony."

Held, that Sir James Graham's Act did not become inoperative, *ipso facto*, because of the change in the Colonial Legislature.

Held, also, that the 17th sec. of the local Act was simply inoperative, but that the adoption of parts of the English Act, which were clearly inapplicable here, was not to be regarded as suicidal, and that an intention may be inferred that that statute should be recognized, so far as it could be applied to the law of the Colony.

The dismissal of a case by a magistrate, upon a declared opinion that he has no power to adjudicate, cannot be looked upon as an adjudication.

IN this case a rule *nisi* for a *mandamus* had been obtained calling upon *H. Macdermott*, Esquire, one of Her Majesty's Justices of the Peace for the City of Sydney, to show cause why he should not be ordered to adjudicate in a certain information under the Water Police Act, 7 Vic., No. 21, which had been dismissed by him under an impression that the 54th clause of Sir James Graham's Act, 5 and 6 Will. IV, c 19, precluded him from adjudicating.

Windeyer produced an affidavit from the Magistrate stating the case had been dismissed, and submitted that the proper course for the applicant was to commence proceedings afresh, and take out a *mandamus* on the Magistrate refusing to go into the matter.

(1) *The Sydney Morning Herald*, Feb. 16 and 17, April 17, 1844.

1844. The COURT held that the dismissal of a case, upon a declared opinion
Ex parte that the magistrate possessed no power to adjudicate, could not be looked
DEEDO. upon as an adjudication, and that the argument must be proceeded
Dowling C.J. with.

Argument having been heard, Feb. 17, the Court reserved judgment.

April 15. The judgment of the Court was delivered by—

The CHIEF JUSTICE: On the last day of last term, cause was shown against a rule *nisi* for a *mandamus*, to be directed to Henry Macdermott, Esq., one of Her Majesty's Justices of the Peace, in and for the City of Sydney; commanding him to hear and determine a summons exhibited by *Deedo*, late a seaman on board the ship *Strathisla*, against the owners of that vessel, for the recovery of wages claimed to be due to him, to an amount not exceeding £20. The Justice refused to adjudicate, on the ground of want of jurisdiction.

The *Strathisla* was a colonial registered vessel, of 387 tons, and owned by resident merchants in Sydney. The applicant had hired himself to serve as a seaman on board the vessel from Batavia to any port or ports in the Indian Islands, and to the port of Sydney, there to be discharged. The vessel having returned to her home port and been discharged, *Deedo* summoned the owners for his wages, under the Act 5 and 6 Will IV, c. 19, s. 15, which gives jurisdiction to decide on claims to an amount not exceeding £20 for seamen's wages, to any Justice in any part of Her Majesty's dominions, residing near to the place where the ship shall have ended her voyage, cleared at the Custom House, or discharged her cargo, or near to the place where the master or owner, upon whom respectively the claim is made, shall be or reside. By the 54th section of the same Act, it is enacted that that Act "shall not extend or apply to any ship registered in or belonging to any *British* colony having a *Legislative Assembly*, or to the crew of any such ship, while such ship shall be within the precincts of such colony, anything hereinbefore contained to the contrary notwithstanding."

By the local Act of the Governor and Legislative Council, 7th Victoria, No. 21, entitled, "*An Act to amend an Act, entitled an Act for the further and better regulation and government of seamen within the Colony of New South Wales and its dependencies, and for the establishment of a Water Police*," "and further to amend the law relating to the government of seamen in the merchant service," which was passed on the 23rd December, 1843, after reciting by the 17th section, that "it is expedient to remove doubts as to whether the statute 5 and 6 William

IV, C. 19, be now in force in the colony of *New South Wales*"; it is in the gross "*Declared and enacted that that Act is and shall be in force and operation in this colony.*" Notwithstanding this declaratory enactment of the local Legislature, the Justice below refused to adjudicate on the claim, being of opinion that the 54th section of the recited Act deprived him of all power of adjudication.

1844.

Ex parte
DEEDO.*Dowling C.J.*

It could not be disputed but for the 54th section of the English statute, which is popularly called Sir James Graham's Act, the Justice below would have had jurisdiction to adjudicate upon this seaman's claim, that section, however, having expressly enacted that the statute shall not apply to any ship registered in or belonging to any British colony "having a *Legislative Assembly*," one question presented for our determination was, whether for the purposes of that enactment the Legislature of this, as a *British* colony, must not now be held to be a *Legislative Assembly* within the intent and meaning of Parliament, and consequently that the Justice below had no jurisdiction.

Until the passing of the Statute 5 and 6 Vic., c. 76, establishing the present Legislative Council, composed as it is of twelve nominees of the Crown, and twenty-four elected representatives, this colony could not be said to possess a *Legislative Assembly*, according to the constitutional meaning of that description of legislative body. It is to be observed that the 54th section of the Act does not say "having a *House of Assembly*" but "having a *Legislative Assembly*." The former has a definite meaning, as a body of popular representatives, analogous to the House of Commons, distinct from Councillors appointed by the Crown. By the new legislative constitution for this colony, the distinct elements, which form the Legislatures of other colonies, are amalgamated into one body, for the same common purpose of ordaining laws for the welfare and good government of the people. In common parlance, as well as for all practical purposes, when their elements are congregated together, they form a *Legislative Assembly*. In name, it is true, they are called a *Legislative Council*; but in substance and fact they are a *Legislative Assembly*. By 5 and 6 Vic., c. 76, did Parliament mean to confer something more of political power on the people of this colony for the purpose of local legislation, that was imparted by the statute 9 Geo. IV, c. 83? If it did, what was the meaning and intent of the concession? The 22nd section of that Act, acknowledging the necessity of devolving upon persons resident in the colony, the power, under proper restrictions, of making laws and ordinances for the welfare and good government of the colony, recites,

1844. "And whereas it is not at present expedient to call a Legislative Assembly
 Ex parte in either of the said colonies,"—and proceeds to constitute a Council of
 DEEDO. nominees of the Crown, not exceeding fifteen, nor less than ten. If it
 Dowling C.J. was *inexpedient then* to call a Legislative Assembly, what has Parliament now done by the statute 5 and 6 Victoria, c. 76? It has in fact, called together twenty-four elective representatives of the people, and has associated with them twelve nominees of the Crown, who, but for this arrangement, would have been a separate body as a Council, in like manner with some other colonies. In name, they are properly called, when assembled together, a Legislative Council; but in fact, they are a Legislative Assembly. The establishment of a Legislative Council so constituted appears to us to satisfy the meaning of the 54th section of Sir James Graham's Act, when it speaks of a *Legislative Assembly*, that is, an Assembly in which popular representatives are collected, armed with full powers of local legislation. If the Act had said, "having a *House of Assembly*," there might have been a difficulty in holding that our present Council, with its conjoined elements, answered the meaning of the Parliament. It must be taken, that the Act contemplated colonies which had not within themselves powers of legislation with popular elements, adequate to the satisfactory enactment of local laws for the welfare and government of Her Majesty's subjects. This view of the question seems to be somewhat fortified by bearing in mind the date of Sir James Graham's Act, and the date of that for the government of New South Wales. The former was passed on 30th July, 1835; and the latter on the 30th July, 1842, and Parliament may be fairly supposed to have in view, that the constitution of the new Legislature for New South Wales, would except the colony out of the operation of the Seaman's Act. Taking, therefore, that the Legislative Council of this colony may be regarded as synonymous with a *Legislative Assembly*, with power to adopt or reject Acts of Parliament which are in force in other parts of the *British Empire*; the second difficulty which arises in this case, is, as to the *mode* in which the power has been exercised. The Local Act, 7 Vic., No. 21, sect. 17, has, without discriminating what parts of Sir James Graham's Acts are, and what are not, applicable to the colony, has in the gross *declared* and *enacted* that the *whole* Act shall be in full force and operation in the Colony. Now, there are several clauses which are wholly inapplicable to the Colony, such as those which relate to parish boys, parish apprentices, contributions towards hospitals, and others.

Notwithstanding, however, this seeming incongruity, and taking it to be clear that the present Legislature of the Colony may be regarded as a

Legislative Assembly within the meaning of Sir James Graham's Act, still the question is, whether that Act was not in operation, either by its own force, or by force of the Local Act, 7 Victoria 21. It is clear that up to the institution of the present Legislative Body, Sir James Graham's Act was in force here, even with respect to colonial vessels, inasmuch as this Colony in 1835 (when the Act was passed) was not a colony previously to that time "having a Legislative Assembly." Taking it then that the present Colonial Legislature is a Legislative Assembly within the meaning of the Act, still if Sir James Graham's Act was in force at the moment the new local Legislative was instituted, surely it did not become the less in force by the mere change in the Legislative Constitution of the Colony. Having once commenced its operation in the Colony, it could not *ipso facto* cease to operate, because of the change in the Colonial Legislature. There is nothing in the Act showing that it was thus to fluctuate and shift in its applications. The words are "having" (that is then, in 1835) "a Legislative Assembly," and not "which shall have," and enacting "that thereupon the Act as to such Colony should cease."

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Ex parte
 DEEDO.
 Dowling C.J.

In this view of the case presented to us, it is unnecessary to give any opinion as to the force or effect of the Local Act, 7 Vic. No. 21, sec. 17. There may have been doubts entertained as to the applicability of Sir James Graham's Act in the Colony, and the local Legislature may have felt it necessary to enact the 15th section, which is little more than transcript of the 6th section of Sir James Graham's Act. It appears to us that the 17th section of the local Act may be simply regarded as inoperative, but that at all events, whatever difficulties there may be in the case, with respect to portions of Sir James Graham's Act, which are clearly inapplicable to the Colony, we cannot regard it as "suicidal," but the intention may be inferred to have been, to recognise that statute, so far as it *could be applied* as the law of the Colony. There is not much weight to be attached to the supposed difficulty that the 54th section was also adopted. There is no doubt that there were clearer and better ways of effectuating the intention of the local Legislature; but that intention, we may conclude, was to adopt all the provisions of the Act *preceding* that section: for if this be not its meaning, the 17th section has none at all.

On the whole we are of opinion that the *mandamus* ought to go.

Rule absolute.

1844.

ARNOLD v. JOHNSTON. (1)

April 18.
 Dowling C.J.
 Burton J.
 and
 Stephen J.

Action against magistrate—24 Geo. II, c. 44—Notice—Variance—Allegation of malice.

In an action against a magistrate for assault and false imprisonment, under 24 Geo. II, c. 44, from the general tenor of a notice given by the plaintiff to the defendant, in which the word "maliciously" was used in describing the nature of the injury, it could only be inferred that an action upon the case was contemplated. Instead of this, the proceeding ultimately adopted was an action for trespass. *Held*, that the variance was fatal.

MOTION for a new trial or to enter a non-suit. This was an action for assault and false imprisonment against a magistrate, in which a verdict had been given by the jury for the plaintiff, damages £150.

This application was based on several grounds, of which one only, viz., variance, was dealt with.

Windeyer and Lowe for the defendant.

Broadhurst, in support of the verdict.

The CHIEF JUSTICE said, that the Court was bound to expound the law as it stood, without entering into the merits of the case, and he must hold therefore that a fatal variance existed between the notice of action which had been proved, and the notice of action which was afterwards commenced. The Act 24 Geo. II, c. 44, under which such notice was rendered necessary in all actions of this description, was passed with a view to the special protection of magistrates, so that by having a month's notice of any action about to be commenced against him, probably for a mere error of judgment in the performance of his magisterial functions, he might have time afforded him to offer reparation for the injury he might have inflicted. By this Act two things were rendered essentially necessary in the notice,—first, that it should state the nature of the process intended to be sued out; and, secondly, that it should equally designate the kind of action intended to be brought. In the first particular, the notice was no doubt a good one, but in the last it was unquestionably defective, for by the use of the word "maliciously," in describing the nature of the injury on which the complaint of the plaintiff was grounded, and by the general tenor of the notice, it was

(1) *The Sydney Morning Herald* April 19, 1844.

only to be inferred that an action upon the case was contemplated, instead of which the proceeding ultimately adopted was an action of trespass.

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BURTON, J., was of the same opinion, and could only account for the notice being drawn up in those terms, by supposing that at the time it was served upon the defendant it was contemplated to bring an action on the case, although upon afterwards discovering the existence of an error in the magistrate's warrant, it was determined to commence an action for trespass. Looking, however, at the facts of the case, and the manner in which the defendant and constable were proved to have acted, it was rather to be regretted that the Court felt itself compelled, upon legal grounds, to decide as it did, for the conduct of Major *Johnston* in allowing the plaintiff to remain twelve hours in the lock-up, before he went into the examination, and his subsequent refusal to give bail, or to send to a second magistrate for that purpose, was to say the least of it, very improper. It was not because a prisoner was brought in a little while after the usual hour for Bench business that he was to be detained in custody without a hearing until the business-hour next day, and he hoped to see the very wholesome practice of the English Magistracy, who disposed of cases with as little delay as possible as they were brought in, adopted in the colony more generally. The conduct of the constable, who thought fit upon his own responsibility to put handcuffs upon the defendant, was unjustifiable in the extreme, and a person capable of doing so, was very unfit to retain an office of that nature. In refusing to take measures for admitting the plaintiff to bail, Major *Johnston* had likewise acted very harshly, as even supposing a case to have been made out, the offence charged was undoubtedly such a one as admitted of bail being given; but in the present instance, there was not a tittle of evidence to substantiate the charge which had been brought against the plaintiff, for even assuming that the property had been stolen, still there was not a shadow of proof that the plaintiff could have had any knowledge of it. The variance between the notice of action and the action itself was, however, so obvious, that the Court was bound, in his opinion, to grant a *nonsuit*.

STEPHEN, J., coincided in the opinion of his brother Judges as to the fatality of the variance between the notice of action with which the defendant had been served, and the action itself, which was subsequently commenced against him. The obvious inference to be drawn from the notice was, that it was intended to commence an action on the case, and he could well imagine that a magistrate, who, if he conceived the action

1844. was merely one of trespass would have been disposed to have offered
reparation, would refrain from doing so when he perused such a notice
as the one in question ; for seeing himself charged with " wilfully and
maliciously " committing the alleged injuries against the plaintiff, he
might naturally conceive within himself that not having been actuated
by any malicious motives, he could not consistently make any offer for
arranging an action commenced against him on these grounds. He
agreed, however, with what had fallen from Mr. Justice *Burton* relative
to the circumstances of the case, and he thought with His Honor, that
the defendant had acted throughout towards the plaintiff, Mr. *Arnold*,
with a very improper degree of harshness.

Nonsuit granted.

REGINA v. HODGES AND LYNCH. (1)

1844.

*Certiorari to Court of Quarter Sessions—Errors of fact—Crown Prosecutor—4 Vic.
No. 22, sec. 10—Defect on the record.*

April 26.
May 21.

Dowling C.J.
Burton J.
and
Stephen J.

Courts of Quarter Sessions in New South Wales are not instituted after the course of the Common Law, for here the Courts proceed by information of a Crown Prosecutor instead of the indictment of a Grand Jury, and this involves a most vital departure from the Common Law, so that if a Crown Prosecutor be not appointed in the manner laid down by the Legislature, the objection is as serious as to a Grand Jury improperly empanelled.

The Supreme Court has authority, after conviction and judgment for felony at the Court of Quarter Sessions, to remove the record of conviction by *certiorari* for the purpose of quashing it, not for error on the record, but for facts extrinsic of the record.

Evidence of such facts must be brought before the Court by affidavits.

After conviction a prisoner cannot raise as an objection on the return to a *certiorari* anything which he could have advanced in the court below.

A defect in the record cannot be advanced as a matter of error, if notice has been specifically given of it in the court below, but reference to it may be properly allowed, as a circumstance to be taken in connection with other evidence *dehors* the record.

The sittings of the Supreme Court do not, as those of Queen's Bench, supersede the power of Courts of Quarter Sessions.

Under 4 Vict. No. 22, sec. 10, the Governor has power to appoint a Crown Prosecutor, but an appointment thereunder, held to be void by a Court of Record, does not vacate a previous commission; nor is the issue of a commission invalidated by the attachment of an irregular condition thereto, that the appointment shall be subject to the approval of the Queen.

In this case it appeared from the affidavits brought before the Court that the prisoners were tried and convicted before the Court of Quarter Sessions on April 4, to which day the Court had been adjourned from day to day since April 2, and on April 6 were sentenced to twelve months' imprisonment in Parramatta Gaol, where they were still confined. A commission to act as Crown Prosecutor had been issued by the Governor to Mr. *Rogers*, but on this commission being held bad by the Court of Quarter Sessions, the information had been laid and the prosecution conducted by Mr. *Cheeks*, whose commission as Crown Prosecutor was dated before that of Mr. *Rogers*.

On April 26 *Windeyer* moved the Supreme Court for a *certiorari*, or if the Court should think otherwise, for a rule *nisi*, calling upon the parties against whom it should be issued to show cause why a writ of *certiorari*

(1) *The Sydney Morning Herald*, April 27 and 30, May 3, 4, 14, 15, 22, and 24, 1844, and 4 S.C.R. App. 26.

1844. should not be taken out to remove into that Court the record of the
 REGINA conviction of the prisoners. The rule was granted, returnable on the
 v. 29th April, on which day it was made absolute, the return to the
 HODGES, *certiorari* to be made on May 2.

May 2. On this day *Foster* and *Windeyer* for the prisoners moved that the return brought into Court be filed; the *Attorney-General* and the *Solicitor-General* opposed this on the ground that the proper proceeding was by writ of error.

Cur. adv. vult.

May 3. The judgment of the Court was delivered by—

The CHIEF JUSTICE: Most undoubtedly the question raised by this proceeding is one of grave importance, and having called for, has received our anxious consideration. The question has never been solemnly decided by the Court, although it was incidentally raised in the case of the *Queen v. Peckham*, in March, 1841, in which the legality of the conviction was impeached upon a similar objection to that which is supposed to invalidate the proceedings in the present instance. In the argument addressed to the Court, no express decision was cited adverse to the exercise of the jurisdiction which it was contended this Court possesses to review, by *certiorari*, in a summary manner, errors either of fact or of law into which Courts of inferior jurisdiction may have fallen in the exercise of their powers. It seems to have been conceded, that the decided cases in the Courts at home, have established that in general the superior Courts of Record will not review the decisions of an inferior Court of competent jurisdiction, after conviction and judgment, except by writ of error; but it was acknowledged, on the other hand, that on a writ of error the superior Court could only look to the Record, and would not allow the truth of it to be impeached by extrinsic evidence, or proof of facts *dehors* what is returned as matter of record. Taking it to be indisputable that the record in the present instance is perfect on the face of it, and that it does not disclose errors of law, it must be admitted that a writ of error could not avail the prisoners, as they would be estopped from showing extrinsic facts going to the very root of the jurisdiction of which the record seemed to present indubitable evidence in point of legal formality. If this be a right position (and the authorities go that length), the prisoners could gain no advantage by being driven to a writ of error, if their object was to show that the proceedings of the Court below were *coram non judice*, in point of fact, however seemingly right they might be in law as appeared by the

record. Bringing a writ of error under such circumstances would be a dilatory and expensive process without any useful result, in the way of substantial justice. Remediless then as the prisoners would be by such a proceeding (if their objection be founded on fact not on record), the question is whether this Court has authority to protect them from the consequences of a supposed illegal conviction. It may be that the prisoners might have immediate recourse to the Executive, to relieve them from the effect of an illegal conviction, but I apprehend that before they were driven to that mode of proceeding, they would have a right to ascertain in the first instance whether the highest judicial tribunal in the land could afford them redress by law before they resorted to the last extremity of appealing to the Sovereign Justice of the Crown. The true question then is, whether this Court has inherent powers to afford redress, unfettered by the technicalities of a writ of error, and may not at once enquire into the proceedings of the Court below, and ascertain by *extrinsic* evidence, whether their jurisdiction has been exercised according to law. As already observed, no case has been cited expressly adverse to the exercise of such a power in the Queen's Bench at Westminster, but because the reported cases have been only those in which the *certiorari* has been issued *before* conviction and judgment, it was contended that they amounted to a tacit inhibition of the right to a *certiorari*, *after* conviction and judgment. It was, however, not contended that this Court was absolutely prohibited by express decision from the exercise of a *discretion* in the matter. This admission certainly ought not to influence the decision of the Court, unless they were satisfied on principles of law that such a discretion could be exercised. Taking the concession in its widest latitude, the Court would and could not act upon it as a wild and arbitrary discretion, but a discretion governed by a sober, reasonable, and judicious exercise of power with reference to the immutable principles of public justice and dictates of sound reason.

This Court is the creature of the Act of Parliament, 9 Geo. IV, c. 83, and as a Supreme Court, has conferred upon it all the powers of the Four Courts at Westminster, vested with the like jurisdiction as the Queen's Bench, it has the power of "correcting and examining all manner of errors in fact and in law, of all Justices, in their judgments, process, and proceedings"—Co. Just. 74. "Its jurisdiction is very high and transcendent. It keeps all inferior jurisdictions within the bound of their authority, and may remove their proceedings to be determined here, or prohibit their proceedings below. It commands Magistrates to do what their duty requires in every case where there is no other specific

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1844. remedy. It protects the liberty of the subject by speedy and summary interposition"—3 Bl. Com. 44. The only difficulty in the present case is, as to the form and manner in which the power thus conferred is to be exercised. It is not disputed, that a writ of error would not reach the alleged objection to the conviction of the prisoner. Then how is redress in point of law to be afforded in a case of this kind? The supposed objection to this conviction is, that the party in whose name and at whose instance the prosecution has been instituted, has no legal authority for his interposition on behalf of the Crown. If this suggestion be well founded, in point of fact, it cannot be denied that it is a vital defect in the jurisdiction of the Court, as much so indeed as if the persons who tried them were without Commission. The proceeding would be *coram non judice*. But taking it to be well settled, that this Court, with the Jurisdiction of the Queen's Bench at *Westminster*, cannot by *certiorari* remove the proceeding, of a Court of competent Jurisdiction for mere errors of form on the record, but would compel the party complaining to bring his writ of error, after he had suffered the opportunity to go by of moving in arrest of judgment in the Court below, still that principle seems not to govern the case where the objection goes not to form, but the substance of the jurisdiction exercised by the Inferior Court. For this there are divers authorities. It may be that they are of some antiquity, but I apprehend they are not the less to be respected, as the depositories of the best principles of English law. In 3 *Bac. Ab.*, 58, citing 3 *Inst.*, 231, and *Hawk P.C.*, c. 50, s. 3, it is laid down, that "any judgment whatsoever, given by persons who had no good commission to proceed against the person condemned, may be *falsified*, by shewing the *special matter* without writ of error, because it is void; as where a commission authorises to proceed on an indictment, taken before A. B. and C., and twelve others, and by colour thereof the commissioners proceed on an indictment taken before eight persons only." Again, in the same book, citing *Cro. Eliz.*, 489, "If a man is found guilty upon an indictment of felony, and prays his clergy, and it is allowed him, and he is burnt in the hand, he cannot avoid this by writ of error, because he is convicted only and not attainted. But the record being removed by *certiorari* into the Crown office, if there be a fault in the indictment, it may be discharged, and restitution awarded to the party of his goods seised for that cause." In the same page, citing *Phorbe's case* (3), is another position which, in connection with a subsequent passage in the 63rd page of the same work, is most pertinent to the present case, as shewing that *certiorari* is the proper mode of

(3) Raym. 433.

setting right the alleged error of this conviction." If a man had been indicted upon the statute of 3 Jac. I, c. 4, for absenting from his Parish Church, and thereupon proclamations had been made that he should render his body, &c., which not being done he had been convicted according to that statute, yet no writ of error would have lain thereupon, for by the statute, after proclamation made, and the default recorded, the same was a conviction of the offence, as if the statute gave process for the forfeiture, *and if there was a fault in the record the party's remedy was in the Exchequer to quash it there.*" Following out this principle, it is laid down in the same book (citing *Salk*, 263, pl. 6, *Lord Raym.*, 213, 252, 454), thus, "wherever a new jurisdiction is erected by Act of Parliament, and the Court or Judge that exercises this jurisdiction, as a Court or Judge of a Court of Record, according to the course of *common law*, a writ of error lies on its judgment, but where they act in a summary method, *or in a new course different to the common law*, then a writ of error lies not, but a CERTIORARI." A judgment may be falsified, reversed, or avoided, in the first place without a writ of error, for matters foreign to or *dehors* the record, that is *not apparent on the face of it*, so that they cannot be assigned for error in the superior Court, which can only judge from what appears in the record itself:—thus if any judgment whatever be given by persons who had no good commission to proceed against the person condemned, it is void; and may be falsified by shewing the special matter, without writ of error—4 *Blackstone*, 390.

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Now applying this principle to the present case, it is perfectly cogent in favour of the *certiorari*. The Courts of Quarter Sessions in this Colony are created by Parliament, and their proceedings regulated by local Acts, and are not *instituted* according to the course of the Common Law although they have a Common Law jurisdiction. By the course of the Common Law, all indictments and presentments are found by a Grand Jury of twenty-three, twelve of whom must concur in finding the Bill or presentment. By the statute 9 Geo. IV, cap. 83, all informations are to be prosecuted, both in the Supreme Court, and at Quarter Sessions, and in the name of the *Attorney-General*, but in consequence of the inconvenience of requiring the *Attorney-General* to attend Quarter Sessions, power is given by the local Ordinance, 4 Victoria, No. 22, to the Governor to appoint any officer or officers by whom and in whose name all crimes cognizable in the Courts of General and Quarter Sessions may be prosecuted. This is a new course, different from the common law, and if the course pointed out has not been

1844. pursued, or the power of the Governor not properly exercised, it
 REGINA seems that the error is to be corrected, not by *writ of error*, but by
 v. *certiorari*.
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Dowling C.J. In the absence of any express authority fettering the salutary control which this Court ought to exercise over the proceedings of inferior Courts of this Colony, I do not see how we can resist the present motion. The Court has no desire to claim to itself a jurisdiction which might interfere with the fair and legitimate discharge of the functions of such Courts, but living in a remote English Colony, this Court is bound not to abridge the rights of Her Majesty's subjects, in having the mode in which the law is administered in subordinate jurisdiction, tested by the principles of English jurisprudence. It is possible, though I persuade myself utterly improbable, that in such jurisdictions grievous errors in fact might be committed, even in violation of the first principles of natural justice; and yet if this Court were not open to afford a speedy remedy, public justice might be brought into contempt.

It may be that the wretched men whose interests are conserved in the present application, may have been righteously convicted on the merits of their case, but if there be any well-founded objection to the legality of their conviction, this Court cannot deny them any remedy which the law will afford. We cannot look to the convenience or inconvenience to which this, as a precedent, may, be supposed to lead, but are bound to discharge the functions it committed to us by expounding and upholding those principles of justice which are the best safeguard of society. I am of opinion that the *certiorari* has not been improvidently issued, and that the return thereto must be filed.

May 13, 14. A writ of *habeas corpus* having issued in this case to bring up the bodies of the prisoners, on May 13,

Foster and Windeyer, for the prisoners, moved that the judgment against them might be reversed.

The *Attorney-General* and the *Solicitor-General contra*.

A proceeding by writ of error is the only proper course for the prisoners, to reverse the judgment of a Court of Record.

Cur. adv. vult.

May 21. The judgment of the Court was delivered by

The CHIEF JUSTICE. Although the Court has decided on a former day upon argument, that after conviction and judgment for felony at the Court of Quarter Sessions, this Court has authority to remove the

record of conviction by *certiorari* for the purpose of quashing it (*not for error on the record, but for facts extrinsic of the record*), yet, if persuaded by the more elaborate second argument of the 13th instant (which the law officers of the Crown were permitted to enter into), that its first decision was erroneous, the Court could have had no hesitation in retracting its steps on more advised consideration. We confess that notwithstanding the proper jealousy which this Court ought to entertain of the introduction of novelties into the administration of the law, and with that becoming reverence which we trust the Judges in this remote dependency will ever entertain for the wisdom of Westminster Hall, our opinion has not been shaken by what was addressed to us in the recent very able argument, as to the soundness of the *principle* on which the *certiorari* was granted.

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Yielding respect to the weight of authority, that errors on the records of a Court constituted by the *course of the common law*, could only be reviewed by writ of error, the Court would have denied the *certiorari*, in this instance, on that ground (except for the purpose of assigning errors of record); but constituted as the Courts of Quarter Sessions in this Colony are, in one most vital and important integral part of their jurisdiction, in a manner contrary to the course of the *common law*, we were not fettered by any decision in refusing the *certiorari* for the purpose of showing matters *dehors* the records, and establishing the extrinsic facts, that the whole proceedings against the prisoners were void in their inception.

The gist of the first objection to the judgment pronounced on the prisoners is, that the information on which it was founded was not presented by an officer properly authorised by law for that purpose. If this were an objection apparent on the record, it is not now necessary to decide whether it must not be brought under review by writ of error. The only use which could be made of such a defect on the record would be as *evidence* confirmatory of the extrinsic circumstances, or at all events not negating such circumstances.

Adverting to this objection, the first question to be determined is, whether the Courts of Quarter Sessions in this Colony are instituted in all particulars according to the course of common law; secondly, if they are not, whether the deviation be of serious importance; and, thirdly, whether the departure from the course pointed out by the Legislature can be taken advantage of in this Court by *certiorari* in a summary manner by affidavits, showing the departure,

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First.—By the course of the common law of England no man can be put on his trial for felony, but on presentment by a Grand Jury, twelve of whom must concur in finding the indictment, not only on their own oaths but on the oaths also of the witnesses to sustain the Bill. By the New South Wales Act, 9 Geo. IV, c. 83, the institution of Grand Juries in the administration of criminal justice is withheld, not only in the Supreme Court but in the Courts of Quarter Sessions, and in lieu thereof all crimes cognizable by these Courts respectively shall be prosecuted in the name of the *Attorney-General or other person* appointed for that purpose by the Governor of the Colony. It is quite obvious, therefore, that the Courts of Quarter Sessions of the Colony are not, in this particular instituted after the course of the common law; although subsequent proceedings after the presentment of an information by the Attorney-General, or other person appointed for that purpose, may be conducted according to the course of the common law.

Secondly.—Is the deviation of importance? Whatever may be the diversity of opinions in modern times as to the utility or inutility of Grand Juries in the administration of criminal justice, the people of England have at all times regarded the institution with sacred reverence, as one of the best safeguards of life and liberty. Indeed, to prevent the admission of improper persons on Grand Juries, various statutes have been passed to remedy the mischief which had arisen to innocent subjects from indictments found against them by improperly constituted Grand Juries, contrary to the course of the common law. The statutes 11 Henry IV, c. 9, and 3 Henry VIII, c. 12 (which were passed in times not remarkable for abstinence from adoption of arbitrary principles), were amongst others ordained to remedy such evils. By the last mentioned statute “our said Lord the King, for the greater ease and quietness of his people, willeth and ordaineth, that indictments so made, with all the dependence thereof, be revoked, annulled, void, and holden for none for ever. And from henceforth no indictment be made by any such persons but by inquest of the King’s lawful liege people in the manner as was used in the time of his noble progenitors, returned by the sheriffs, &c., and if any indictment be made hereafter in any point to the contrary, that the same indictment be also void, revoked, and for ever holden as none.” On the construction of this statute it has been held, that offences not capital, are as much within it as indictments for treason and felony, and also that it applies to indictments before Justices of the Peace, as much as indictments before superior justices. *Hawk, P.C., c. 25, ss. 24, 25.*

Lord Coke, 3 Inst., 34, in commenting on these statutes, says :—"And these laws, made for *indifferency of indictors*, ought to be construed *favourably*, for that the indictment is commonly found *in the absence of the party*, and yet it is *the foundation of all the rest of the proceeding*."

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Regarding it therefore as a first principle of the common law of England, that no man shall be put in jeopardy for felony, but by the concurring oaths of at least twenty-four indifferent persons, *i.e.*, of twelve grand jurors to find the bill, and of twelve petty jurors to condemn him,—this Court, sitting in an English Colony, founded by English people, cannot but deem the constitution of the Quarter Sessions in this Colony as involving a most vital departure from the course of common law.

Thirdly.—It being incontrovertible then, that there has been a deviation from the course of the common law, and that such deviation is of vital importance, the next question is, whether any objection can now be made, in a summary manner on affidavit, of extrinsic circumstances, showing that the course pointed out by the Legislature in substituting a crown prosecutor in lieu of a grand jury has not been followed ; or, in other words, that the person standing *in loco* of a grand jury has not been lawfully constituted to perform the duties of a grand jury.

If the person so appointed be not appointed according to the mode pointed out by the Legislature, we apprehend it to be too plain for argument, that the objection would be as available to a prisoner as if he had been indicted by a grand jury improperly impanelled. Indeed we may say that it would *a multo fortiori* available, because of the wide departure from the common law, in the adoption of this anomalous contrivance to dispense with grand juries. The only difficulty that has arisen here is, whether these prisoners are not now out of time, the objection (if well founded and allowable to be proved by affidavit) not being made until after trial, conviction, and judgment.

In the construction of the statute 3 Hen. VIII, c. 12, it has been holden (2 Hawk. P.C., c. 25, s. 26) "that a person arraigned upon any indictment taken contrary to the purview thereof, may plead such matter in avoidance of the indictment, and also plead over to the felony." Again, it is laid down "that a person outlawed upon any such indictment, without a trial, may also show in avoidance of the outlawry, that the indictment was taken contrary to the purview of the statute. But if a person, who is tried upon such an indictment, take no such exception before his trial, it may be *doubtful* whether he may be allowed

1844. to take such exception afterwards, because he has slipped the most
 REGINA proper time for it; *except* it can be *verified* by the records of the same
 v. Court, wherein the indictment is depending, but as an outlawry in such
 HODGES. Court of one of the indictors, &c., in which it is laid, that any one as
 Dowling C.J. *amicus curiæ* may inform the Court of it." 3 *Inst.*, 34.

Giving full effect to the proposition, that in ordinary cases, a prisoner, shall be estopped from making formal objections after arraignment, trial, conviction, and judgment, which is no doubt a sound principle, still, if by law it can be made to appear by affidavit, upon the return to a writ of *certiorari* into this Court, that from circumstances he was prevented by available means from making the objection in the Court below, it would be hard upon a prisoner if he were told that the time was gone by, no matter how palpable the error might be. Now, had these prisoners the means or opportunity of taking the supposed objection to the appointment of the gentlemen, in whose name they were in fact prosecuted.

Assuming that we are at liberty to look at the affidavits filed on both sides in this case, it appears that on the 3rd January, 1844, Mr. *E. Rogers*, the Clerk of the Peace, received a commission from the Governor, appointing him to be Crown Prosecutor at the Parramatta Sessions, and on presenting it to the Chairman and other Justices assembled on that day, the Bench, after hearing counsel, and Mr. *Nichols*, an advocate, pronounced the commission wholly void, and Mr. *Rogers* did not act.

At that Session an information was lodged against the prisoners, in the name of Mr. *Cheeke*, as Crown Prosecutor, he having a commission issued prior to that of Mr. *Rogers*, to which they pleaded without making any objection to Mr. *Cheeke's* acting. The trials of the prisoners were postponed until the following April Sessions, when another information was filed against them in the name of Mr. *Cheeke*, to which they pleaded, were tried, convicted, and sentenced, without any objection that Mr. *Rogers's* commission superseded Mr. *Cheeke's*, or that Mr. *Cheeke* had then not sufficient authority to act as Crown Prosecutor. At the trial, Mr. *Nichols*, the prisoners' now attorney, acted as their advocate. It may be that Mr. *Nichols*, as their advocate, might, at both sessions, have taken the objection that Mr. *Rogers's* commission superseded Mr. *Cheeke's*; but after it had been solemnly decided, that Mr. *Rogers's* commission was void, it would have been an idle ceremony to take the objections he himself being one of the gentlemen who had, in January sessions, contended for its invalidity. At the April sessions it was not

known that no new commission had been issued to Mr. *Checke*, and it was not known, in fact, until the 24th of April, after the sessions had terminated.

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Taking it as a sound rule, that the prisoners were bound to make the objection at the trial (if they knew it), it seems that it would have been unavailing to them after the sessions had adjudged Mr. *Rogers's* commission to be void, and as it was not known to them at the trial, either that no commission was issued to Mr. *Checke*, or that there was any supposed infirmity in his old one, we do not think that the prisoners could now be prevented from impeaching the judgment, if it can be impeached in the manner proposed. *Dowling C.J.*

In the case of *Rez v. Dickinson* (4), is an authority for holding, that an objection not known to the prisoner, or the Court, until after conviction, will not preclude him from the benefit of it, if it goes to the legality of his trial. There the prisoner had been convicted of cattle stealing, but, after conviction, it appeared that the witnesses had attended before the Grand Jury *without having been sworn*. The learned Judge (*Bayley*) thought the objection came too late, and therefore passed sentence upon the prisoner, but reserved the point for the consideration of the Judges, and the case being afterwards considered, they, without deciding as to the validity of the objection recommended a free pardon. In that case, the fact of the irregularity, would not have appeared on the record, and could only have been got at by extrinsic evidence; and, though it be not an authority for the mode of correcting the error in this case, by *certiorari*, yet it shows the cautious jealousy with which the Judges of England regard the due administration of justice. It might to some appear to be an unimportant objection that the witnesses were not sworn before they went before the Grand Jury, when they were afterwards sworn at the trial, and the prisoner righteously convicted by the Petty Jury on the merits of his case. Still the Judges must have held, that he was not lawfully convicted upon an indictment duly presented according to law, though presented by the Grand Jury on *their* oaths. In effect, the principle of the objection in the present case (if well established) resolves itself into the question, has this information been duly presented by a *quasi* Grand Jury, duly appointed in the manner prescribed by law?

Taking it that the objection could not availably be made at the trial,—that it is not one appearing on the record,—that it could only be

1844. established by extrinsic evidence,—and that the mode of initiating the
 REGINA trial is contrary to the course of common law,—has this Court the
 v. power of correcting the alleged error in the way proposed?
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Dowling C.J. Conceding that a writ of error lies, and that the prisoners may assign errors of fact, and that an issue is the proper mode of trial by the country, what process have we for directing the trial of such an issue? The authorities cited in our former decision, show that the jurisdiction of the Quarter Sessions, being constituted in a vital branch of its proceeding, contrary to the course of the common law, the judgment may be falsified by showing the special matter without *writ of error*. How then can this Court reach the special matter except upon affidavit? In a vast variety of cases, both criminal as well as civil, this Court is in the habit, necessarily, of determining facts, in incidental proceedings, upon affidavit, and on principle, there seems nothing repugnant to the course of justice in determining by affidavit, the question raised on these affidavits, whether, for the purpose of the validity of this judgment, the gentleman appointed to conduct this prosecution was duly appointed under the Act of Council by which he holds his commission.

We are not called upon to (nor would we upon a collateral issue of this kind) determine the *right* of this gentleman to hold the office he claims to hold. The proper legal mode of determining that question would be by writ of *quo warranto*, to which he would be a party, and, as far as his rights are concerned, they might then be solemnly determined. But for the purpose of this case, and as regards the positions of the prisoners, the Court has authority to ascertain as a fact, whether his appointment is in pursuance of the power of appointment vested in the Governor under the local Act, and from whom he derives his commission.

Two objections were made to the validity of Mr. *Cheeke's* appointment as Crown Prosecutor, prior to the 30th December, 1843: first, that it was superseded by the appointment of Mr. *Rogers*, in January, 1844; and secondly, that, supposing that Mr. *Rogers's* appointment had not that effect, Mr. *Cheeke's* original appointment was not conformable to the Act of Council under which he was appointed, and, no proper commission having been issued to him authorising him to act in presenting an information against these prisoners, the judgment was void, as being *coram non judice*.

We shall address ourselves to the latter objection in the first instance.

By the local ordinance, 4 Vic. No. 22, s. 10, after reciting the statute of Geo. IV, c. 83, by which all crimes cognizable by the Supreme Court should be prosecuted by information in the name of the Attorney-General, or other person appointed for such purpose *by the Governor*, and that all crimes (not committed by transported felons) should be prosecuted and tried before the Courts of General Quarter Sessions in the colony, in the same manner and subject to the same rules in every respect as trials in the Supreme Court; and reciting the expediency of appointing separate officers to prosecute in all trials for crimes within the limits of Port Phillip and New Zealand (when it was a dependency on the colony), respectively, as well as in the Courts of General Quarter Sessions throughout the colony, proceeds to enact "That until *Grand Juries* be established, therein, it shall be lawful *for the Governor* to appoint, *from time to time*, some fit and proper person for Port Phillip, and a like person for New Zealand [such persons being respectively barristers of England or Ireland], by whom and in whose name all crimes, &c.," cognizable in the Supreme Court of New South Wales, and in the several Courts of General and Quarter Sessions (save as excepted in the recited Act) shall be prosecuted within the aforesaid limits of Port Phillip and New Zealand respectively, "and also that it shall be lawful *for the said Governor* to appoint" (omitting the words *from time to time* "any officer or officers by whom and in whose name all crimes, &c., cognizable in the several Courts of General and Quarter Sessions in all other parts of the said colony may be prosecuted, except as aforesaid: Provided always, that nothing herein contained shall be construed to limit or control any authority vested by law in Her Majesty's Attorney-General for the said colony."

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From this provision it appears, that the power of appointing the officer or officers in whose name all crimes may be prosecuted at Quarter Sessions is vested in the Governor absolutely, without any reservation of the pleasure of the Crown. This being a new office, and the power of appointment being conferred unreservedly on the Governor himself, and subject indeed to no condition whatever, the question is whether the power has been exercised in the mode and manner in which it has been conferred?

We are now to look to the most material affidavit produced on this point—namely, that of Mr. *Cheeks* himself, from which it appears, that by a commission under the great seal of the colony, and the hand of the Governor, dated 2nd June, 1841, in pursuance of the Act, 4 Vic.,

1844. No. 22, he was appointed "during the pleasure of the Governor, and subject to the approval of Her Majesty, her heirs, and successors," to be, and act as such officer in the Act mentioned, and to be the person by whom, and in whose name, all crimes, misdemeanours, and offences, not being committed by transported offenders, cognizable in the several Courts of Quarter Sessions to be holden in all parts of the colony, save and except *Port Phillip* and *New Zealand* excepted, should be prosecuted"; which commission was duly enrolled in the office of the Colonial Secretary, and also in the Supreme Court, and which commission he accepted, and in pursuance thereof took the necessary oath of office before one of the Judges. The affidavit goes on to state, that by warrant under the Royal Sign Manual, dated 11th January, 1842, he was confirmed in his office of Crown Prosecutor, and thereupon letters patent, under the great seal of the colony, and the hand of the Governor, were issued and duly enrolled, dated 2nd August, 1842, by which he was appointed Crown Prosecutor in the territory of New South Wales, "*during the pleasure of Her Majesty Queen Victoria.*" It is further sworn, that he had never been removed or suspended from, nor ever resigned his office, and hath always acted, and still does act, as such Crown Prosecutor, under and by virtue of the *first commission* issued by the Governor, and under and by virtue of the warrant under the Sign Manual, and under the second commission issued by the Governor. In conclusion the affidavit states, that on deponent's return from Maitland in January last, he had an interview with the Governor at His Excellency's request, and was then informed by the Governor, that he was fully authorised to conduct the prosecutions which he had so already conducted on behalf of the Crown, as well as any thereafter to be conducted in the said several Courts of Quarter Sessions respectively.

The Commissions under which this gentleman has been appointed have not been produced for inspection; but we must now take it from his own representation of their contents, that by the first he held the office "during the pleasure of the Governor, and subject to the approval of Her Majesty, her heirs, and successors," and the second, not during the pleasure of the Governor, but during the pleasure of Her Majesty Queen Victoria. If, as is sworn by Mr. *Cheeke*, that he is designated both in the Queen's warrant and in his second commission as "Crown Prosecutor," it is to be observed that the Act under which he is appointed contains no such designation, the words being "officer by whom and in whose name all crimes, &c., may be prosecuted."

Disregarding this, however, as not a very material circumstance, can we say judicially that either of these appointments is not in pursuance of the authority under which the power is conferred by the Legislature? The local ordinance it is true, in terms, confers the power on the Governor himself alone, without any reservation, either of his own pleasure or that of Her Most Gracious Majesty. As representative of the Crown, for Ministerial purposes, the duty is properly imposed upon His Excellency of communicating the appointment and taking the pleasure of Her Majesty upon it; but we apprehend that the appointment itself should be in pursuance of the Act of the Legislature by which the office was created. If this be not so, what limit is to be put upon departures from the mode and manner in which the Legislature confers power? This may be said to be a very strict objection, to which perhaps too much weight ought not to be attached in the ordinary transactions of mankind; but when it concerns the validity of the lawful authority of a functionary to act in the place and stead of a *grand jury*, in the administration of a vital part of the criminal justice of the country, and who is armed with the power of saying in his discretion who shall and who shall not be put on trial by informations in his name, the Court cannot shrink from the duty of looking upon it as a most serious objection (if it can be maintained), involving much more important consequences than the interests of the prisoners now before the Court.

The jealousy with which, even in olden time, the Legislature has guarded against the unlawful constitution of grand juries, has been already pointed out, and the strictness noted with which the Judges of England, in *Dickinson's case* (5) gave a prisoner the advantage of an error almost of mere form. These considerations warn this Court of the necessity of seeing that justice is administered in this colony by authorities properly constituted by law, and in such form only as the law has provided.

On the argument of this case the prisoners' counsel prayed in aid the record itself as confirmatory of the extrinsic evidence that Mr. *Cheeke* had not been appointed in pursuance of the Act, for it was urged that had he been so appointed the record would have alleged the fact. The information begins thus:—"Be it remembered that *Alfred Cheeke*, Esq., who prosecutes for Our Sovereign Lady the Queen, in this behalf, being present in the Court of General Quarter Sessions of the Peace now here, &c., informs the said Court," &c. This certainly does not give any notification that Mr. *Cheeke* is an officer by whom and in whose name the

(5) Russ. & Ry., 401.

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1844. *crimes may be prosecuted* in pursuance of the Act of Council. The Court could not take judicial notice that *Alfred Cheeke*, Esq., was an officer so appointed. Of the Attorney-General and the Solicitor-General, the Court are bound to take judicial notice as known law-officers of the Crown ; but of a private individual by name, without any designation of his authority to perform the functions of a Crown Prosecutor, the Court cannot take such notice. They may privately notice that the gentleman so named is competent for the office, but not that he is a duly appointed officer to prosecute on behalf of Her Majesty unless it is made so to appear.

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The defect in the record thus pointed out, was not permitted to be taken as a matter of error, inasmuch as no notice had been specifically given of it by the prisoners' law adviser ; but reference to it was, we think, properly allowed as a circumstance to be taken in connection with other evidence *dehors* the record. Whether on a writ of error, (if this be a case in which error lies) or by assignment of error, the record being now before the Court, the objection would not be *absolutely fatal*, we are not now called upon to determine. It is enough for us to decide whether Mr. *Cheeke* had a sufficiently good commission from the Governor to act as an officer in whose name all crimes may be prosecuted within the jurisdiction of the Courts of Quarter Sessions. Mr. *Cheeke* swears that he has so acted under his first commission, (which has never been revoked) and under the warrant with the Royal Sign Manual, and also under the second commission, or letters patent.

Upon full consideration, we are of opinion that Mr. *Cheeke's* Commission of the 2nd June, 1841, sufficiently constituted him to be the officer in whose name crimes were to be prosecuted at Quarter Sessions, and that the power of the Governor has been exercised by him in a manner not open to any objection available to the prisoners. It is true that the commission appoints him "during the pleasure of the Governor, and subject to the approval of Her Majesty, her heirs, and successors." Although the local ordinance does not contain either of those conditions, yet the introduction of them by the Governor, as Representative of the Sovereign, does not, in our opinion, vitiate the commission, and they may be rejected as mere surplusage. They are but supplemental to the act of appointment by the Governor. There is certainly an informality in introducing the conditions, but as the Governor has in fact exercised the power conferred upon him by the Legislature in appointing this gentleman, the annexation of the conditions, though not imposed by the Act, cannot be held by this Court as rendering the commission void.

Whatever defects there may be in the subsequent commission issued to Mr. *Cheeke*, founded on the warrant under the Royal Sign Manual, we think that as Mr. *Cheeke* has a good commission, not superseded, and under which he has acted, the second may be treated as inoperative. The mode in which the Governor has exercised his power, by importing into the commission conditions not contained in the Act, has certainly raised doubt and difficulty ; but on the whole, we are satisfied that the commission is not void, though open to the objection of great irregularity.

Were we not satisfied on this point, the Court would have been greatly embarrassed in dealing with the other objection, namely, that supposing Mr. *Cheeke's* commission to have been properly issued, still it has been superseded by a subsequent commission issued to Mr. *Rogers* for the same identical purposes, and duly notified in the *Government Gazette*.

Mr. *Rogers* states in his affidavit, that whilst he was attending as Clerk of the Peace at the Parramatta Quarter Sessions, on the 3rd January last, a commission from the Governor, appointing him Crown Prosecutor, was forwarded to him from the Colonial Secretary's Office, without any previous intimation to, or request from, him, and without any emolument to be derived therefrom. Immediately, by order of the Court, he read the commission aloud ; and therefore it was objected by the Barristers present, and by Mr. *Nichols*, attending as an Advocate, that the commission was wholly void ; and the matters objected being considered, the Court pronounced it to be void accordingly. The Court then adjourned till next day. On the next day, Mr. *Cheeke* performed the duties of Crown Prosecutor, and continued to do so during that and the subsequent Session in April, when the prisoners were convicted. It does not appear that Mr. *Rogers* has surrendered his commission, and for anything to the contrary he stills holds it. He does, however, state, that he has not claimed to execute, and has not executed or qualified, by taking any oath of office, or otherwise to claim or execute the office of Crown Prosecutor, and has never been admitted an Advocate at the Quarter Sessions ; but, on the contrary, is and has been excluded therefrom by a Rule of Court, made in pursuance of the Act, 4 Victoria, No. 22. From the affidavit of Mr. *G. W. Newcombe*, a clerk in the Colonial Secretary's Office, it appears, that according to the usual practice, notices of appointments are prepared and dated at the same time as the commission : and that at the time of issuing the commission to Mr. *Rogers* to act as Crown Prosecutor, there was prepared and sent to the *Government Gazette* a notice of such appointment, intended to appear on the

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1844. 5th January last, but before the publication, he was informed, and
 REGINA believed that it was decided by the Governor, that Mr. *Cheeke* should
 v. continue to act as Crown Prosecutor; but from some oversight no
 HODGES. order was sent to the *Gazette* Office not to insert the notification of the
 Dowling C.J. appointment of Mr. *Rogers*, and the notification was therefore by mistake published on the 5th January. It does not appear, however, that this mistake has ever been corrected, and consequently it must be taken that Mr. *Rogers* still stands gazetted as Crown Prosecutor, and as not yet having surrendered his commission.

Much discussion took place before us as to the effect of Mr. *Rogers's* commission and the publication of his appointment in the *Gazette*, as having the legal consequence of superseding Mr. *Cheeke's* commission. The latter gentleman swears that he never resigned his commission. If so, it would follow that until a vacancy was created, the Governor could not appoint anyone in his stead. It was however argued by the Attorney-General that Mr. *Rogers's* appointment was consistent with that of Mr. *Cheeke*, for by the peculiar wording of the local ordinance, the Governor might appoint more than one Crown Prosecutor for the Quarter Sessions, for the words are "officer or officers," but we think that these words must be read distributively, and do not import a power of appointing any number of officers for the same Quarter Sessions. It would seem that after Mr. *Rogers's* appointment, and before it was published, some communication took place between the Governor and Mr. *Cheeke*, and the Chairman of the Quarter Sessions respectively, in which oral arrangement was made that Mr. *Cheeke* should continue to act as Crown Prosecutor under his commission. Still we have the somewhat anomalous fact of two persons holding commissions at the same time, from the same authority, for the performance of the same duty—an irregularity which has led to considerable embarrassment. It is true that the Quarter Sessions adjudged Mr. *Rogers's* commission to be void, and we are not prepared to say that, as a Court of Record, the Sessions had not full power and authority to determine upon the fitness and qualifications of an officer presented to them for the conduct and despatch of such important duties as those of Crown Prosecutor, notwithstanding that Mr. *Rogers* held a commission for the purpose. To hold otherwise, would, on public grounds, deprive a Court of Justice of a most important privilege, and lay it open to have perhaps the most unfit person thrust into an office, concerning the administration of justice, for which he was wholly disqualified. Setting aside this consideration, there was the important fact, however, that Mr. *Rogers* was never qualified for the office, nor accepted it, but repudiated it.

Taking it now that the appointment of Mr. *Rogers* was a mere mistake, fallen into without due consideration of the legal consequences, and that Mr. *Checke* must still be regarded as the officer appointed by the Governor, in whose name crimes were to be prosecuted, we are bound to hold for the reason already given, that that gentleman's commission has been made in sufficient compliance with Act of Council, although we cannot but think that His Excellency was ill-advised in issuing a commission with the supplemental conditions thereto attached. These conditions have given rise to the laborious discussion which has ensued, and which might easily have been avoided by adhering to the terms of the power conferred by the local Legislature.

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The second objection to the judgment on the prisoners, was, that they were tried at a Quarter Sessions holden simultaneously with a session of Oyer and Terminer and Goal Delivery of the Supreme Court, and consequently that the jurisdiction of the Quarter Sessions was thereby superseded. It is sworn that on the 2nd April last, in pursuance of the Governor's proclamation, the Quarter Sessions at which these prisoners were tried, were holden at Parramatta, and adjourned from day to day, until the 4th of April, when the trial took place, and that on the 1st, 2nd, and 3rd days of the same month, the Supreme Court was sitting at the Court House, Woolloomooloo, as a Court of Oyer and Terminer and General Gaol Delivery. These facts not being denied, we are called upon to determine that the Quarter Sessions had no authority to try these prisoners, pending the sittings of the Supreme Court in its criminal jurisdiction.

It was contended that although the prisoners were in fact tried on a day when the Supreme Court was not actually sitting, yet that made no difference: for in law, the sittings of the Quarter Sessions are but *one day*, and that if they had no power to sit on the 2nd they had none on the 4th April, for which 2 *Salk.* 606, was cited—an authority not now questionable.

It is not to be denied that this Court, by the statute 9 Geo. IV, c. 83, which created it, has the jurisdiction of all the Four Courts of Westminster, and specially the Supreme jurisdiction of the Queen's Bench over all criminal causes. By that statute it is *at all times* a Court of Oyer and Terminer and General Gaol Delivery; and if the principle [4 *Black*, 266,] applicable to the Queen's Bench at Westminster can come into operation in this colony, it follows as a necessary consequence that no Court of Quarter Sessions can exercise its power in any part of the colony so long as this Court sits. If the actual

1844. sitting of the Supreme Court, as such, be the test, such a consequence cannot be gainsaid, inasmuch as this Court is sitting almost throughout the year alternately, in its several common law, equitable, criminal, and insolvency jurisdictions: for though but one judge may sit in the exercise of the several jurisdictions at a time, still sitting is in law a sitting of the Supreme Court. The mere sitting of the Court for criminal causes only, would not supersede the powers of the Quarter Sessions. The sitting of the Court for any purpose would have the like effect. The whole of the colony is in law but one *county*, as respects the jurisdiction of this Court. It is not divided into separate counties as in England. Nay, the Commission of the Peace is not directed to magistrates of any particular district or county, but the magistrates appointed by the Crown are justices for the *whole territory*, except for the City of Sydney and the town of Melbourne, into which separate commissions issue. If, therefore, the Supreme Court is to be regarded in the same light as the Queen's Bench at Westminster, its sittings at any time (which may be throughout the whole year) would give rise to the apparently insuperable objection that no Court of Quarter Sessions can exercise its powers in any part of the colony during any such sittings. Does, however, this most alarming and mischievous consequence follow? We apprehend not. The jurisdictions of the Supreme Court and of the several Quarter Sessions of this colony, are severally created by the *same statute*, and derive their authority from the same common source. The Supreme Court has the like *jurisdiction* as the Queen's Bench at Westminster, but it does not follow that it has *exclusive jurisdiction* over offences triable by the Court of Quarter Sessions. The same Act that institutes the Supreme Court, also institutes Courts of Quarter Sessions, and gives to these Courts the like jurisdiction as is vested in the Courts of Quarter Sessions in England, as well as an extensive summary jurisdiction over transported offenders. The Supreme Court may have *all the jurisdictions* of the Queen's Bench, without becoming "the Queen's Bench"; and it may have every portion of that jurisdiction to all intents and purposes, without its appropriating to itself also, the fiction upon which the supposed analogy is founded, that the Sovereign is actually present in person to preside over its administration. Were it not for this fiction (6), it would be difficult to contend that even the sitting of the Queen's Bench in England would interfere with the power of any other Court. Supposing, however, that this Court is simply to be regarded as the Queen's Bench, we are of opinion that its sittings would not interfere with the sittings of the Quarter

(6.) 7 Bac. Abr., title *Court K.B.*; 4 Blac. 265.

Sessions in this colony. The Courts of Quarter Sessions in England are not created by *statute*, neither are Courts of Oyer and Terminer. They sit in England in each county by virtue of the Queen's commission. It is true they sit quarterly by statute; and they have also by statute conferred upon them certain criminal jurisdiction; but still they derive their powers from the Royal Commission, issued to Justices *individually as Justices of the Peace*.

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In this colony the several Courts of Quarter Sessions are instituted as "Courts" specially, by name, by virtue of the same statute which gives jurisdiction to this Court. Admitting, therefore, that this Court and the Queen's Bench have respectively the like jurisdiction, still the Quarter Sessions here have a concurrent jurisdiction in criminal cases, similar to that exercised by Quarter Sessions in England, notwithstanding the sitting of the Supreme Court, subject, however, to the superior and superintending control of this as the Supreme Court of the colony. By the statute 9 *Geo. IV*, c. 83, this Court is vested with the power of fixing the times and places at which it shall hold its sittings. Is then the jurisdiction of the Quarter Sessions over matters properly within their powers to depend upon the time and place at which this Court shall fix its sittings? The anomaly has been guarded against by the Legislature, in creating the Courts of Quarter Sessions distinct and separate from the Supreme Court, quite independently of the principle on which Quarter Sessions exist in England. The power of fixing the time and place at which such Courts should be holden was not in like manner provided for as the sittings of the Supreme Court, and hence it became necessary for the local Legislature to interpose. Accordingly, by the 3 *Will.*, IV, No. 3, s. 14, power is vested in the Governor to fix the times and places in which such sittings shall be holden, to be notified in the *Government Gazette*. It may be that there is no declaration that the sittings of the Supreme Court shall not operate as a supercession of the sittings of such Courts, but such a declaration, upon the plain construction of the statute which created them, was wholly unnecessary. All the fiction which is applicable in *England* to the paramount presence of the Queen's Bench in a county into which a commission is issued, really falls to the ground, and is wholly inapplicable to the jurisdiction of the *county* (for such it must be regarded for the purpose of this argument) of *New South Wales*, which has two separate jurisdictions created by the statute, subject only to the control of the supreme over the separate inferior jurisdiction. We are not driven to arguments of convenience or inconvenience in so holding, but are bound so

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to determine, from the plainly expressed intention of Parliament in providing for the due administration of justice in New South Wales, in the Supreme Court, and the Courts of Quarter Sessions respectively.

Dowling C.J. It appears to us, therefore, that the seemingly cogent objection to the sittings of the Quarter Sessions in this case, concurrently with those of the Supreme Court in its Criminal Jurisdiction, is really without foundation. The Judges by Rule of Court fixed its sittings for the 1st April, without reference to the Quarter Sessions, and the Governor, in virtue of the local Act, appointed the Quarter Sessions to be holden in Parramatta at the same time ; but as he had the power of so doing, it appears to us that there is no analogy between the sittings of this Court and that of the Queen's Bench sittings in an English county into which a *Commission* from the Crown had issued to Justices or others to constitute a Court of Oyer and Terminer.

Admitting it to be argumentatively doubtful whether this Court has exercised lawful authority in granting a *certiorari* for the purpose of correcting errors of fact, alleged to have been committed by the Quarter Sessions in matters not appearing upon the record, these prisoners have had the advantage of a most elaborate investigation of their case, and after full deliberation, we are of opinion that in this mode of proceeding there is no ground for disturbing the judgment, and consequently they must be remanded in execution of the sentence of the Court below.

If they have any other remedy for disturbing the judgment, they must take such steps for that purpose as they may be advised.

Let the prisoners be remanded to Her Majesty's Gaol at Parramatta.

Prisoners remanded to former custody.

[INSOLVENCY JURISDICTION.]

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June 5.

Dowling C.J.

Assignment for benefit of creditors—Date of execution by majority in number and value—5 Vic., No. 9, secs. 33, 34, and 37—5 Vic., No. 17, sec. 5—7 Vic., No. 19, sec. 8—Mortgagee—Contingent creditors.

An assignment by a debtor of all his property to trustees for the benefit of his creditors according to the forms laid down by ss. 33 and 34, 5 Vic., No. 9, is exempted from the operation of 5 Vic., No. 17, sec. 5, rendering it an act of insolvency, by 7 Vic., No. 19, sec. 8.

Held, that it was not necessary that the majority in number and value of the creditors should sign the deed before notification in the *Government Gazette*, &c., that the deed became operative so soon as it was so executed, and that this execution must take place before the debtor's estate is placed under sequestration.

A mortgagee, in the absence of any provisions in the Act to the contrary, may be included in the number of such creditors entitled to sign, if his debt be due.

Holders of contingent liabilities of the debtor (here, holders of bills endorsed by the debtor) cannot be included in the number of such creditors.

Creditor's petition under sec. 13 of the Insolvent Debtors' Act, 5 Vic., No. 17, praying that the estate of *Stephen Coxen* might be sequestrated for the benefit of his creditors, founded on a fraudulent assignment, and an unsatisfied judgment debt.

On May 9 a Judge's order had been obtained, on giving security for costs, by *W. B. Carlyle*, the petitioning creditor, placing the estate under sequestration. Notice having been given by the debtor of his intention to dispute the matters of the petition, the case was argued by *Windeyer*, for the petitioner, and *Manning*, for the debtor. It was admitted that the debtor had executed on the 25th April, 1844, a deed of assignment of the whole of his estate for the benefit of his creditors in conformity, as alleged, with the Acts, 5 Vic., No. 9, and 7 Vic., No. 19, sec. 8, amending 5 Vic., No. 17, sec. 5. The deed was executed on the same day by the debtor, and the three trustees therein named, in the presence of, and attested by, *William Dawes*, Esq., a magistrate, and duly registered, and the execution notified in the *Government Gazette* and one other Sydney newspaper within fourteen days from the date thereof. A majority in number, but not in value, of the creditors, signed the deed before the date of the petition, and others had since signed, bringing up

(1) *The Sydney Morning Herald*, June 7, 13, 20, 27, and 28, 1844. This case is cited 9 N.S.W. L.R. 122.

1844. the signatures to a majority in value (as alleged by the debtor). The principal point argued was whether it was necessary to the validity of the deed, that the signatures of the creditors should be made before the notification in the *Gazette*, &c.

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Cur. adv. vult.

The CHIEF JUSTICE. The question raised on this application is no doubt one of considerable importance. In deciding it, the Court has not been influenced by any consideration of the consequences, one way or the other, of a decision, in this, or in any bygone, or future case of like kind. The simple question is, whether upon a fair and intelligible construction of the Acts of Council under consideration, the deed of assignment executed by Mr. *Coxen* in the manner proved, or admitted, can be treated as an act of insolvency, subjecting him to a compulsory sequestration of his estate.

There has been no impeachment of this instrument, on the ground of moral fraud—want of consideration—or unfairness towards any of his creditors. It is conceded that it is an assignment of *all* his estate, real and personal, for the benefit of *all* his creditors,—that the schedule annexed contains a true and just list of his creditors at the time of its execution; that the present petitioner is amongst the number; that it has been executed by him and his trustees respectively, in the presence of, and attested by, a magistrate; that it has been registered and duly notified, according to law, in the *Government Gazette*, and in a newspaper published in Sydney, within fourteen days of its execution, and that it has all the *indicia* in conformity with the Act of Council, short only of non-execution by a majority *in number* and *in value* of the creditors, at the time of its publication. The question is, whether this is a defect which justifies this Court in holding within the meaning of the 6th section of the Act 5 Vic., No. 17, that Mr. *Coxen* has committed an act of insolvency by *fraudulently* alienating his property.

The assignment professes to be made in conformity with the Act 5 Vic., No. 9, sections 33 and 34. Assignments of this kind, made under that Act, before the passing of the General Insolvent Act, 5 Vic., No. 17, were by the 6th section of the latter Act protected; and but for the passing of 7 Vic., No. 17, any such assignments afterwards would not have been so protected. By that Act, however (section 8), after reciting the 5th section of 5 Vic., No. 17, and the 33rd and 34th sections of 5 Vic., No. 9, enacts, “that after the passing of this Act, no conveyance or assignment, which shall be made under, and executed in conformity with, the provisions of 5 Vic., No. 9, shall be deemed

fraudulent within the intent and meaning of the Act 5 Vic., No. 17, or shall be void under, or be in any manner affected by, the same, or any part thereof; nor shall any person, having executed any such conveyance or assignment *in conformity with the provisions of 5 Vic., No. 9*, be afterwards liable to be adjudged insolvent by reason thereof; or of his not pointing out to the Sheriff, or his officers, any property belonging to him sufficient to satisfy any writ in the hands of such Sheriff, anything in the Act 5 Vic., No. 17, notwithstanding."

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The point then in controversy is, whether by the reasonable construction of the 33rd and 34th sections, taken severally, this assignment has not for the purposes of excluding Mr. *Coxen* from the operation of the 5 Vic., No. 17, been executed in conformity with the 5 Vic., No. 9?

There is an obvious want of congruity between the provisions of the 33rd and 34th sections respectively, as to their several operations. By the 33rd section "After the passing of that Act, any debtor who shall execute a conveyance to trustees of all his estate and effects, for the benefit of all his creditors (to be named in a schedule annexed to such deed, with the amount due to them respectively), and such deed shall be executed by such debtor and trustees, and by the *majority in number and in value* of such creditors, or by the agents of such of them as shall be absent from the colony." Then what benefit is to be derived therefrom? Why!—"the *person* of such debtor, from and after the publication of such notice aftermentioned shall be *absolutely free from arrest* on execution at the suit of any creditor named in such schedule, in respect of any debt or sum therein included."

There is here no provision made as to the *time* and *mode* of execution by *creditors*, nor is there any declaration of the operation of the deed, beyond that of freeing the *person* of the *assignor* from *arrest*. As far therefore as freeing the *person* of the debtor from *arrest* (when by law imprisonment for debt was in full force), it may, I apprehend, well consist with a clause so worded, that the debtor should not be exempt from *arrest*, unless the deed is executed in the manner therein precisely provided. Freedom from arrest was the only advantage to be gained by the debtor. That advantage might depend upon *strict* conformity with the terms of the clause. Arrest for debt, except in certain excepted cases, is now abolished, and therefore the requisites of a deed with *the view to protect the person* of the debtor are no longer obligatory. The effect of this deed must then depend as it appears to me upon the construction of the 34th section. Now when we come to the 34th section,

1844. we do find provision for the *time* and *mode* of executing the deed by *the debtor and his trustees*, so as to divest him of his estate for the benefit of his creditors, and we find, also, a distinct provision for giving the *creditors* time and opportunity for *executing* it, if they are so minded, quite different from that of the execution of the debtor and the trustees; and by the 37th section, we have a declaration of the operation of the deed, not as it affects the debtor's *person* but the property assigned by the deed.

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Dorling C.J.

The 34th section enacts, by way of proviso, "That every such deed shall be executed": by whom—at what time—and in the presence of whom? By such *debtor* and *trustees* respectively, *in the presence of, and shall be attested by, some justice of the peace.*" There is here no provision that the execution by the majority of the creditors in number and in value shall be *so instant* with the insolvent and the trustees, or even in the presence of any body. But there is a provision as to them as follows:—"And that a notice of the same" (that is, of the execution by the debtor and the trustees) "*attested in like manner, and stating truly where such deed is lying for inspection and execution,*" (that is by the *creditors*) "shall within fourteen days next after such execution" (that is by the debtor and trustees) "be published in the *Government Gazette* and one other newspaper published in Sydney."

To what intent was this notice to be given? and why was a place to be assigned for inspection and execution, but in contemplation of giving creditors an opportunity, after fourteen days' notice, of signing and sealing the deed? It must be obvious that the Legislature by requiring this public notice, contemplated the improbability, if not impossibility, in many cases, from the wide extent of the colony, of obtaining the execution of the deed by a majority in number and in value of creditors at the time of the execution by the insolvent and the trustees, or even within fourteen days of *their* execution. As far as the debtor and the trustees, whose execution was attested in the presence of and by a magistrate, were concerned the deed so executed was a complete deed before the notification in the manner prescribed. What then was the object of the notification, but to apprise creditors that it had been so executed by the debtor and the trustees, and to give them the opportunity of coming in and taking the benefit of it, by joining in the execution? If, indeed, the Legislature had, in terms, exacted that *before notification*, in order to render it operative upon the estate of the debtor, it must be executed by a majority, in number and in *value*, of the *creditors*, there could have been no

difficulty. There would have been an end to the question. But no time being fixed for execution by the creditors, but a time being fixed within which, and the manner in which, it shall be executed by the debtor and trustees, the reasonable construction is that *as soon* as it shall be executed by a majority in number and in value of the creditors, *then* it shall have the effect declared by the 37th section, namely of vesting absolutely all the estate of the debtor in the trustees for the purposes declared in the deed. It does not appear to me, that the language of the 37th is inconsistent with the construction which the Court puts upon the 34th section. The power of *arresting* for debt being now gone, and the 33rd section being no longer operative as it respects the *person* of the debtor—the 37th enacts “that after the execution of any such deed *so executed*”—*i.e.* by the debtor and his trustees, in the presence of, and attested by, a magistrate, “and after the publication of such notice thereof as in that behalf is hereinafter required,” the property of the debtor shall absolutely vest in the trustees, *as soon as* (according to my construction of the 34th section) a majority in number and in value of the creditors shall have executed. I confess that the point is not free from doubt and difficulty; but contemplating, as the Legislature appears to have done, by requiring notice to be published within fourteen days, that it might be impossible from a variety of circumstances, for a debtor, *bond fide* executing such a deed, to procure the execution of a majority in number and in value of his creditors, within fourteen days, I think it is not an unreasonable construction of the 34th section to hold, that a deed executed in the manner therein pointed out and duly notified as required, becomes operative *so soon* as a majority in number and in value of the creditors shall have executed. Agreeably to this construction, the Court is driven to hold that *until* it is so executed by a majority in number and in value, it would not be operative. No time being fixed for the creditors to come in and execute, undoubtedly it would then remain in abeyance until such a majority had executed. In the present case it is conceded that *now* (that is) at the time the Court was called upon, on the 29th May, to *adjudicate* upon the present petition, a majority in number and in value have executed, and noting the absence of any limit of time within which the creditors shall execute, I think I am bound to hold that this deed has now absolutely vested the estate of the insolvent in the trustees, for the benefit of all his creditors—including the present petitioner, and that the deed operates as a bar to the other act of insolvency relied upon, depending for its effect upon the validity of the assignment under 5 Vic., No. 9, now legalized by 7 Vic., No. 19, sec. 8.

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1844. Had the Court entertained any insuperable difficulty in arriving at
In re the conclusion thus enunciated, I should have had some doubt in
COXEN. holding that such an assignment was an act of *insolvency* within the
Dowling C.J. intent and meaning of the 5th section of 5 Vic. No. 17, on which the
petition is founded. Could it be said upon the plain purview of that
section, that this was a *fraudulent* alienation when the whole scope and
object of the deed was to give up *everything* the debtor had in the
world for the benefit of *all* his creditors? It is free from all the badges
of fraud which it was the object of the Insolvency Act to denounce.
Executed by himself and the trustees in the presence of, and attested
by a public functionary, and notified to the world in the *Government*
Gazette, and a public newspaper; I cannot but think (in the absence of
any latent or patent vice in the instrument) that it would be a violent
construction to hold, that a debtor so acting, had made a *fraudulent*
assignment within the meaning of the section on which the petition was
based. It is obvious that the fraudulent alienation therein contem-
plated, which shall be deemed to constitute an act of *insolvency*, is some
underhanded, dishonest, or preferent disposition of the property of the
debtor to the prejudice of his creditors generally, and not the open and
fair assignment of all his estate to the trustees for the very purpose of
ratable distribution amongst *all* to whom he is indebted. This is a case
which falls within none of the other sections of the Act, 5 Vic., No. 17.
relating to fraudulent alienations; for they all contemplate individual
preferences or undue advantage given to particular creditors. The
proviso to the 6th section of Act declares that conveyances of the
kind now under consideration shall not be deemed fraudulent or void
within the meaning of that Act. The 7 Vic. No. 19, sec. 8, makes the
like declaration; but even if this deed had not been executed *strictly* in
the manner contended for in support of the petition, I am bound to say
that I should have hesitated in pronouncing the execution of it, with
the intent and object in view, a *fraudulent* alienation within the meaning
of the section on which the petition rests. Being of opinion, however,
for the reasons already given, that this deed of assignment has been
executed conformably with the 34th section of 5 Vic. No. 9, and was on
the 29th May, at the time the petition was submitted for *adjudication*,
in fact; executed by a majority in number *and in value of the creditors*,
I must supersede the order for placing *Mr. Coxen's* estate under seques-
tration, and dismiss the petition; and I do so adjudge accordingly; but
I cannot say that the petition (in the language of the 27th section) was
unfounded and vexatious, or malicious, I simply pronounce that it be
dismissed.

After the delivery of the above judgment, it was stated by *Windeyer* that it had not been admitted, that, at the time when the petition was brought on for adjudication, a majority in number *and in value* of the creditors had executed the deed, and permission having been given to speak to the matter on June 12, on that date the case was again adjourned to June 19 for production of evidence on the point at issue.

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On this day, after further evidence, the Court reserved judgment.

June 19.

Judgment was delivered by the *Chief Justice* after consultation with the other Judges as follows:—

THE CHIEF JUSTICE. This matter came on again for discussion on last Wednesday, for the purpose of determining whether a majority, in number and in value, of Mr. *Coxen's* creditors had, *in due season*, executed the deed of assignment by him on the 23rd of April last, of his property to trustees, in trust for the benefit of all his creditors. On the 29th ultimo, when the case was first before the Court, certain oral admissions were made, which led the Court to believe that up to that moment of time a majority both in number and in value of the creditors had executed; and on that understanding the petition was, on the 5th instant, ordered to be dismissed. Upon being apprised, however, that the Court had misapprehended the extent of the admission, I allowed the case to be spoken to again on Wednesday last. On that day the learned counsel for the petitioner prayed that he might not be bound by mere oral admissions, which were liable to misapprehension, and required that the alleged insolvent should be put to the strict proof of his case in the regular way, and establish that the deed had been duly executed by a majority in number and in value of his creditors. Accordingly, the case was again opened for discussion, without regard to first impressions.

June 26.

It was however conceded, that it had been duly proved on a former day, that the deed had been executed by Mr. *Coxen* and his trustees, in the presence of, and attested by, a magistrate, and within fourteen days from execution, notified in the *Government Gazette*, and in one Sydney newspaper, in pursuance of the Act 5 Vic., No. 9, sec. 34; but it was then insisted that the alleged insolvent must establish that the persons who had been scheduled as creditors, *were, in fact, creditors*; for otherwise it might be, that though the signatures to the names were genuine, yet it did not necessarily follow, that they were the signatures of creditors. The most ready means of clearing up this point, if necessary, was, to call Mr. *Coxen* himself, and examine him upon the subject; but it did not appear that he was in attendance, and he was certainly not

1844. examined. There was, in fact, no proof that the persons signing the deed were creditors, nor was there any evidence that the signatures were genuine. One gentleman, a clerk to the solicitor of the alleged insolvent, *In re COXEN.* proved that under powers of attorney he signed for nine parties, supposed to be resident in the colony; but he did not know that they were creditors of Mr. *Coxen*; nor did he even know of there being persons actually in existence. Nay, there was no proof of the due execution of the power under which he acted. The Court does not go the length of holding that it was necessary to prove that the parties signing were in fact creditors, because if there was any fraud in this particular, it would have been a ground for setting the deed aside, under the 36th section of the Act; but I think it was necessary to prove the signatures to the deed. These were, however, not proved. Resting upon the failure of evidence (assuming the proof to have been necessary) the opposition to the *ex parte* order for placing Mr. *Coxen's* estate under sequestration must have failed; but it being contended that the execution of the deed of assignment by creditors was not necessary at all, so long as it was executed by the insolvent and the trustees, in the presence of and attested by a magistrate, and within fourteen days duly notified in the *Government Gazette* and in a Sydney newspaper, in pursuance of 5 Vic, No. 9, sec. 34; the question was again opened, whether such a deed so executed in trust for the benefit of *all* creditors, without proof of execution by a majority in number and in value of creditors was an act of insolvency within the meaning of the Insolvent Act, 5 Vic, No. 17, sec. 5. This being treated at the re-hearing as the most important question in the case, and upon which a solemn decision of the Court was involved, more serious attention has been applied to it than was incidentally manifested on a former occasion, when a *doubt* was suggested whether such an assignment so executed could in the contemplation of the Insolvent Act be deemed an act of insolvency. In the consideration of this question, I have availed myself of a conference with my learned brethren of the bench, and I am now to notify it as our unanimous opinion that an assignment by such a deed, not executed by a majority in number and in value of the creditors named in the schedule, in pursuance of 5 Vic, No. 9, secs. 33 and 34, is an act of insolvency within the meaning of 5 Vic., No. 17, sec. 5.

It cannot be disputed that, *prima facie*, such a deed is in contemplation of law fraudulent as against creditors. This is the *general rule* applicable to such instruments, and that rule is proved by the express protection given to them by the Legislature, in the Acts 5 Vic, No. 9, sec. 33, 34, and 37, and 7 Vic., No. 19, sec. 8, *provided they are*

executed by a majority in number and in value of the creditors. If they were *prima facie* lawful, there would be no need of such protection. This being the opinion of the Court upon the general point so raised, the question is whether this deed was executed *in due season* by a majority in number and in value of the creditors named in the schedule? Referring again to the reasonable construction to be put upon the 33rd and 34th sections of the Act 5 Vic., No. 9, my learned brethren concur with me in my former opinion that the execution in number and in value by creditors need not necessarily take place simultaneously with the insolvent and his trustees in the presence of, and attested by, a magistrate, to give it validity; but we are agreed that such execution must take place before the deed becomes, under 37th section, operative to vest the estate indefeasibly in the trustees for the benefit of creditors. No time, however, having been limited within which the creditors shall execute, I was strongly impressed with opinion that if this deed had been executed by a majority in number and in value at the period of time when the Court was called upon to *adjudicate* upon the *petition* for sequestration (assuming the fact to be so), that would be sufficient to protect the alleged insolvent from the operation of the Insolvent Act. Upon more advised consideration, I think that the period of time at which the majority of the creditors must be made to appear to have executed, was on or prior to the 9th of May last, when the Insolvent Law was set in motion, and the estate of the debtor placed, by the order of a Judge, under sequestration. In the absence of any limitation of time, within which the creditors should execute, it appears to me that it was competent to any dissatisfied creditor to interfere and treat the assignment, if not duly executed, as an act of insolvency, and if at the time of such interposition, and order made thereon, it was not completed, it could not be perfected in the interval, between the order for sequestration and the final judgment of the Court thereon. It might be mere matter of accident *when* the *adjudication* on the petition would take place, and it is more consistent with reason, that the effect of the instrument should have reference to the time when the order for sequestration was granted; for otherwise, a door might be opened for an active canvass for signatures, irrespectively of the interests of creditors who might not be satisfied with the conduct of the supposed insolvent, or might not choose to approve of the trustees appointed. Taking this more advised view of a point, which was however not much discussed or pressed at the former hearing, I think the question as to when the deed was executed by a majority in number and in value must be determined with reference to the date of the order for sequestration.

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Now, it was not pretended that on the 9th May, which was the date of the order, that a majority in number and in value had executed. The calculation of the accountant examined, had reference to the 29th May, and in that calculation he included as a *creditor* a mortgagee for £3,000, who must be supposed to have had a valuable security for her debt, and excluding a vast number of contingent creditors who held notes of hand, some at long dates, drawn by the supposed insolvent's brother, and endorsed by him.

Two questions incidentally arose, whether a mortgagee having valuable landed security for a debt could be counted as a creditor signing such a deed; and, secondly, whether the holders of contingent liabilities of the supposed insolvent, not capable of being enforced at the time the deed was executed could be considered as *actual creditors*. Upon the first point, my brother judges concur with me in thinking that for purposes of such a deed it is impossible to deny (if his debt be due) that he may be counted as a creditor, in the absence of any provision to the contrary contained in the Act. On the second, they think with me that the holders of contingent liabilities of the insolvent could not be counted in number and value as *creditors* with reference to such a deed; although by the 40th section of the Insolvent Act, 5 Vic., No. 17, adequate provision is made for the proof of such debts against the estate of a declared insolvent.

In the present case, some of the debts set forth in the schedule as contingent, had become before the 9th May absolute, by the dishonour of some of the notes by the maker, Mr. *Coxen* being the endorser.

Not being able to collect that on or before the 9th May last, the assignment by Mr. *Coxen* was executed by a majority in number, and in value of his *creditors*, the Court is bound to hold that he has committed an act of insolvency within the meaning of the 5th section of the Act 5 Vic., No. 17, and consequently his estate must be placed under sequestration absolutely.

The effect of this decision may be of grave consequence in other cases; but it is the province of the Legislature to make more adequate provision for giving effect to such assignments, if it be thought desirable to have a different system for relieving embarrassed debtors, concurrently with that which is provided by the general Insolvent Law.

It is to be observed, that the provisions of the Act for the Advancement of Justice, on this subject, were introduced into that Act, at a time when no general insolvent law was in force; and since the latter measure has been adopted, further enactments have become necessary to give full effect to the voluntary assignment system, in so far as it is affected by the general law.

Sequestration confirmed.

REGINA v. NICHOL AND PRITCHARD. (1)

1844.

Burglary in a dwelling house—Office under separate roof—Communication—7 and 8 Geo. IV, c. 29—Joint occupation.

July 27.

Stephen C. J.

The prisoners were found guilty of burglary in the *dwelling house* of *B.*, and of stealing therein property of *B.* and his partners. Two questions were reserved for consideration, viz.:—whether the place broken into (an office, part of a mill and flour warehouse, in which none slept, and under a separate roof from that of the dwelling house of *B.*, but communicating by a door) was part of the dwelling house; and whether the place must not be described as the dwelling house of *B.* and partners, being used solely for partnership purposes.

Held: That as there was a *direct internal communication*, the cases before 7 and 8 Geo. IV, c. 29, still governed the matter, and the place was part of the dwelling house; also that the occupation by *B.* was rightly described.

IN this case, the prisoners were tried and found guilty of burglary before his Honor the *Acting Chief Justice*, who reserved two points for consideration.

THE CHIEF JUSTICE. The prisoners have been found guilty of a burglary, in the *dwelling house* of *T. C. Breillat*; and of stealing therein a large quantity of bank notes and silver, the property of the said *T. C. Breillat*, and others, his partners. There is no doubt as to the ownership of the goods, and none as to the guilt of the prisoners in taking them. But, as to the *burglary*, two questions were reserved for consideration: *first*, whether the place broken and entered, being part of a mill and flour warehouse,—in which no one actually slept, and which had a separate roof from that of the dwelling house,—can be deemed a part of such dwelling house? and *secondly*, if so, whether the place in question, which was used solely for the partnership, and in their business, and not for any separate purpose by Mr. *Breillat*, can be deemed *his* dwelling? or whether it must be described as the dwelling house of himself and partners.

The dwelling house, it appeared, belonged equally to the Company; but it was exclusively resided in by Mr. *Breillat* alone. It was considered part of the mill premises; but Mr. *Breillat*, who was the managing partner, thought proper to live there for the general benefit of the concern. He receives a nominal salary; he pays no rent for the house in question; and no deduction is made from his share of the profits in respect of his occupation of it. His occupation may therefore, it was urged, be considered part of his remuneration for the management of

(1) *The Sydney Morning Herald*, July 29, 1844.

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the business. Between the house so resided in, and the mill or warehouse, *there is an internal door of communication, broken through the party wall of the two buildings*, and through that door Mr. Breillat passed, from the Company's office, on the lower floor of the warehouse, into his residence, and the converse. From that floor an outer door communicated with the street; that door, and that office, were the places broken and entered, and from the latter the property mentioned was abstracted.

If the office cannot be deemed part of that residence, it is plain that the burglary cannot be committed in it; for, as already stated, it was otherwise not dwelt in by anyone. Can it then be so considered?

The cases on this subject present some difficulties, and apparent inconsistencies. But a reference to the ancient state of the law, with respect to burglary, will much assist our right understanding of the matter. Until the alteration introduced by 7 and 8 Geo. IV, c. 29, the "mansion" or dwelling-house was taken to include all out-houses, parcel of the principal building, though not under the same roof, nor even contiguous to it, and all out-houses were considered within the description, if within the same common fence. That statute restricts the protection to buildings *communicating* with the dwelling, directly, or by means of an enclosed passage. Then is not the office in this case an *out-house*, thus communicating? The doubt suggested on this point rests on the fact that it was not *occupied* in the sense applied to dwellings, nor used for any of the ordinary purposes of a dwelling. But this, it will be observed, does not affect the question; and the cases show that it does not. In *Stock's* case (2) the breaking and entering were into rooms on the ground floor of the building; not slept in by any one, but used solely for the prosecutor's brewery and banking business, and communicating with, and entered only from, the street. A servant of the prosecutor, employed in the brewery, occupied certain rooms in the upper portion of the building, assigned by them specifically to him, as a part of his remuneration. The whole of these premises were under one roof; but there was no internal communication between the sleeping rooms and those used in the business, other than a trap-door never known to have been used. But the Judges held, that it was all one mansion; and rightly described as that of the prosecutors', being occupied by their servant; and the prisoners were executed for burglary accordingly. In *Sefton's* case (3) a father let a shop to his son, who alone used it, and carried on business there. It had a separate

(2) Russ. and Ry., 185; 2 Leach, 1015.

(3) Russ. and Ry., 202.

entrance, and no one slept there. But, as there was no internal communication, in fact, between it and a cellar below, from which last there was a communication with another part of the building, occupied by the father, the shop was held to be a portion of the entire mansion, for the purpose of burglary.

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The case of *Chalking* (4) seems decisive on the point. The building there entered was a workshop, as in this case, *under a roof distinct from that of the building*. It was not slept in, but was used in the business of the owner and occupier of that dwelling, *and there was no internal communication* between the two. But, as the court-yard and garden of the dwelling lay behind the workshop, and a door opened from it into that yard, the offence was held by all the Judges to be burglary. *Hancock's case* (5) is to the same effect. In this, the rooms of a factory, adjoining the dwelling, but communicating no otherwise with it than by a door from the kitchen into a passage—which formed a common entrance to both—were holden to form part of such dwelling, for the purpose of burglary. See also *Lithgo's case* (6).

These cases, it is true, were before the statute mentioned, of 7 and 8 Geo. IV. A different result, therefore, would now follow, under the same circumstances, as to one or both of them; from the absence of any communication between the several buildings, such as that statute requires. But in the present case, as has been stated, there was a *direct internal communication*. The cases are quite in point, therefore, for the purpose for which I cite them.

I proceed to consider whether the dwelling (regarding the office in that light) can in law be deemed that of *Mr. Breillat alone*; seeing that the legal interest was in him jointly only with his partners. The cases of *Rex v. Jones* (7) (cited in *Russ. Cr.* 30), and *Rex v. Parminter* (8) will dispose of this question. In the former, two partners occupied separately adjoining houses; but these were the joint property of the firm, and the rent and taxes were paid of out the partnership funds. It was held, nevertheless, that for the purpose of burglary, each house was the mansion of its particular occupier. In *Parminter's case*, the prosecutor was lessee of the premises, but he had a partner, who contributed to the rent, and slept in the house; and their joint business was carried on in a part of it, which was the part entered. But it held, that the joint interest of the partner, in the shop, did not make it the less a part of the building of the prosecutor and the indictment so describing it was sustained.

The conclusion is, that the conviction in this case is right, with reference to both the points taken. *Sentence was then passed.*

(4) *Russ. & Ry.*, 335. (5) *Russ. & Ry.*, 171. (6) *Russ. & Ry.*, 357.

(7) 1 *Leach*, 537.

(8) 1 *Leach*, 537, *in notie*.

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REGINA v. MACDERMOTT AND OTHERS. (1)

Oct. 31. *Criminal Information—9 Geo. IV, c. 83, ss. 5 and 6—exculpatory affidavits—Jurisdiction of Court.*

Stephen C.J.
Dickinson J.
and
a'Beckett J.

On an application to the Supreme Court for a criminal information under 9 Geo. IV, c. 83, sec. 6, notwithstanding the proviso, that exculpatory affidavits need not be required by the Court, unless the justice of the case demands it, the Court has power to impose terms, as the condition of its interference, and looks not merely at the transaction itself, which is in question, but at all the attendant circumstances.

The Statute extends the power of the Court to cases involving felony as well as misdemeanor, the latter alone being within the jurisdiction of the Queen's Bench.

This was a motion to make absolute rules *nisi*, obtained last Term, calling upon *Henry Macdermott*, *John Macfarlane*, and *Samuel Moore*, to show cause why a criminal information should not be filed against them for having endeavoured to induce one *Robert Lowe* to commit a breach of the peace.

After several preliminary objections, the case was argued on Oct. 22 and 25.

The *Attorney-General* and *Fisher*, for the prosecutor, moved to make the rule absolute. *Rex v. Mansfield* (2).

Broadhurst, *Michie*, and *Darvall* for the defendants. *Rex v. Wroughton* (3), *Reg. v. Baldwin* (4), *Prideaux v. Arthur* (5), *R. v. Eden* (6), *R. v. Eve* (7), and *ex parte Chapman* (8).

Cur. adv. vult.

On this day the judgment of the Court was delivered by—

THE CHIEF JUSTICE. When the rule in this matter was granted, the Judges expressed a doubt whether, having reference to former decisions, the Court could exercise any discretion on a motion of this kind; in other words, whether we were not bound to allow a criminal information to be filed, at the instance of any party, on his establishing a *prima facie* case merely. There is no doubt that such has been the general

(1) *The Sydney Morning Herald*, Oct. 22, 23, 25, 26, and 29, and Nov. 1 and 4, 1844. (2) *The Sydney Gazette*, Dec. 4, 1839. (3) 3 Burrows 1682. (4) 8 A. and E., 168. (5) Loft., 393, 394. (6) Loft., 73. (7) 5 A. and E., 780. (8) 4 A. and E., 773.

understanding in this Court; and the practice, for several years, has been in accordance with it. We are not aware, however, of any express decision to this effect, after argument other than the one cited by the Attorney-General (9). But that decision having been more than once questioned, at the Bar, and from the Bench, though in practice hitherto followed, it can scarcely be considered entitled to the authority which is justly claimed for settled and acknowledged law. The importance of adhesion to precedents in courts of justice, as a general rule, cannot be too decidedly or too often recognised. Even an erroneous judgment is less injurious than are uncertainty and fluctuation. And, where it affects property, or the rights of third parties—especially after a lapse of years—any change is dangerous, and may be seriously unjust. But here, it is obvious, no such considerations interpose. The Court has before it a decision, and a course of practice, under a statute, which, as to the point in question, is of a penal character. The question is, in what cases, and for what purposes, was a certain criminal jurisdiction conferred on this Court, by that statute. And if it appears to us, as it does after full reflection, that that decision, and the practice founded on it, having regard to the terms and object of the enactment, are unwarranted, the duty seems plainly to follow, of giving effect to our opinion.

The Act providing for the Administration of Justice in this colony, or 9 Geo. IV, c. 83, enacts, s. 5, that until further provision be made for proceeding by juries, all crimes and offences shall be prosecuted, by information *in the name of the Attorney-General or other officer appointed for that purpose by the Governor*. By this enactment, therefore, until the establishment of a Grand Jury, the powers and functions of that body are vested exclusively in one officer, without supervision, limitation, or control. But by s. 6 it is provided, that it shall be lawful for any person, *by leave of this Court first obtained*, to exhibit a Criminal Information against any other person, in the name of the Attorney-General or other such officers, for any Crime or Misdemeanor, not punishable by death: and in granting any Rule for exhibiting any such Information (says the Act) the Court shall not be bound to require from the Party applying for the same, any *exculpatory affidavits, unless the justice of the case appears to require that such should first be made*.

The question is, as to the effect and object of these enactments. It appears to us, that they plainly were and are, *first*, to give to this Court, the power possessed by the Queen's Bench, at Westminster, (which otherwise by force of s. 5, and from want of an appropriate officer, the

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1844. Court would not have possessed,) of allowing a Criminal Information to be filed, a power extending to *misdeameanors* only. Secondly, to confer on the Court the still further power, in cases where it might be necessary or proper to exercise it, of allowing a Criminal Information to be exhibited, in cases of *felony* also, or other crime, not capital; in which, the Queen's Bench has not that jurisdiction. Now, in the former class of cases, the Court of Queen's Bench acts on certain prescribed and known rules; founded on the principle, that the application is addressed to its discretion—which those rules are intended to restrain and guide. The proceeding is regarded as one of an unusual nature, out of the ordinary course prescribed by the law, for the prosecution of offences. The Court, therefore, considers itself entitled to impose certain terms, as the condition of its interference, and it looks not merely at the transaction itself, but at all the attendant circumstances, the conduct of the prosecutor, the time at which his application is made, and the object for which it is made. What is there in the enactments cited, to induce or sanction the inference, that in similar cases different rules are to guide this Court? Nothing, certainly, in the language of the section conferring the power. By *leave of the Court*, an information may be exhibited; not otherwise.

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But, whereas at Westminster exculpatory affidavits are always required from the prosecutor (except where circumstances, without his default, preclude the possibility of their being offered), a wider latitude is allowed on such applications here. The Court is not bound to require them, unless it shall think them in justice called for. The introduction of such a provision, pointing directly to the practice of the Queen's Bench in these cases, plainly shows (so to speak) what was then passing in the mind of the Legislature, and may therefore be taken, as indicative of their intention. But, if the construction hitherto adopted were a true one, in other words, if this Court had no discretion in cases of this kind, but must grant an information in every case in which the Grand Jury would find an indictment, that intention would plainly be defeated. The Grand Jury, or the officer substituted for that body, can in no case, and under no circumstances, require exculpatory affidavits or evidence from a prosecutor. The Attorney-General might, indeed, in his discretion, without such evidence, decline to conduct the prosecution. But he could not, on any such grounds, lawfully refuse to initiate that prosecution, in his quasi capacity of Grand Jury. But this Court, in every case, it would seem, may require, and, by the express terms of the statute, it in certain cases *must* require evidence of that nature. It is, therefore, not in the mere position of a Grand Jury. But, if not, as

it appears to us, *cadit quaestio* :—the only argument against our being guided, on this motion, by the rules applied to such cases, in England, is disposed of. We can discover nothing, however, in the *reason* of the thing, or the nature of the jurisdiction, which the Court is in these cases empowered to exercise, to call for or justify the adoption of different rules. The proceeding, by motion to the Court for a Criminal Information, in this colony, is of as unusual a nature—is as much *out of the ordinary course*, prescribed by law for the prosecution of offences—as it can be or is in England. There, the ordinary and prescribed course is an application to the Grand Jury. Here, it is an application to the Attorney-General, acting in their place and stead. Here, accordingly, as there, the deviation from it should be exposed to the same consequences. Under what circumstances this Court may feel called on, in any particular case, to exercise the power of intervention, in cases beyond the jurisdiction, in this respect, of the Queen's Bench we need not now consider. But to hold that, in those cases any more than in cases of misdemeanor, like the present, the Court can have no discretion as to interference, and may not require adequate grounds to be shown for a departure from the ordinary and prescribed course of prosecution for crime, would be to place this Court in the mere position of an alternative tribunal for the initiation of prosecutions on every occasion, concurrently with or to the exclusion of the Attorney-General, at the discretion of any individual in the community, desirous of exposing his neighbour to such an ordeal.

We come now to a consideration of the merits of this case, in reference to the rules adverted to. Of these, one of the most prominent and well established is that the party seeking the interposition of the Court, or for whom it is in fact sought or intended, be himself free from blame in the matter. Another is, in cases more especially of this description, that such interposition be *bonâ fide* sought, for its own sake, for the purpose, in other words, for which it appears to be. The applicant must, therefore, leave himself wholly in the hands of the Court, and must cast no imputations, extraneous to that purpose, on his opponents. Looking, then, to these rules, we cannot divest ourselves of the impression, that there are two circumstances in the case, on which alone, if there were no other,—this Court ought to decline interference. The prosecutor, or those at whose instance he has now appeared, may still resort to that ordinary course of proceeding and remedy, if so advised, which the constitution of the colony has provided; but to this extraordinary interposition, we do not think he is entitled. The first objection is the one pointed out by the Court during the argument. This was an application

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to the Court to permit *Robert Lowe*, Esquire, then a member of the Legislative Council, to file a criminal information against the defendants, the one for sending, and the other for bringing, a certain letter to him, with intent first to intimidate him (*Mr. Lowe*) in the performance of his duties as such member; and secondly, to provoke and stir him up to fight a duel. It is to the latter portion of the complaint that we address ourselves. The former we shall dispose of presently. We enquire, then, in reference to the rules stated, what the conduct and the views are, as admitted by himself, of the gentleman who thus complains? First, he has shown that he is not unwilling,—and in his own narrative he has himself (in effect) avowed, that in a fitting case he would not have hesitated,—to break in the same way the very law, under which he would have this Court assist him, to prosecute another. In what other light can we regard *Mr. Lowe's* allusion, to the station of the supposed challenger? But if we could doubt his meaning, in the reference made to it on the first occasion, it becomes plain when we read the account, of what passed on the second. What was this, but a submission to the very code, a recognition of, and appeal to, those very laws, for the offence of acting on which, the Court is asked to prosecute his opponents! It is surely unnecessary to cite cases, to show that our summary interposition ought not to be conceded, for such an offence to an applicant so circumstanced. But secondly; *Mr. Lowe* has not placed himself in the hands of the Court, nor is he the person we are really asked to protect. He read the letter in question on the 28th June; and he comes here for the first time, on the 3rd August. It should, perhaps, be stated, that he intended to have applied a day or two before, but this is immaterial. It seems that the case was submitted by *Mr. Lowe*, to the Honorable the Legislative Council (for reasons unnecessary here to enter into) on the 3rd July, and the motion to this Court a month afterwards, on the last day of Term was the result. *Mr. Lowe* says in his affidavit, that the proceeding was determined on after investigation by a resolution of that body. It appears to us, that, in so far as the supposed *challenge* is concerned, this fact forms a decided objection to the application. The Court can only recognise *Mr. Lowe* individually, as the prosecutor on that matter. But then, we find that it is not he who in fact seeks our assistance. He comes to this Court in the last resort only, and only at the instance of the Legislative Council. It is not for such circumstances that this particular remedy, depending on principles peculiar to itself, was designed. But, the motion was doubtless made under an erroneous impression, justified by the then practice, as to the duty of the Court in cases of this nature.

The next point is, the alleged intention of the defendants to intimidate Mr. *Lowe* in the performance of his duties. We are of opinion, that this intention cannot fairly be inferred from the terms of the letter. It is therefore scarcely within our province to enquire, how far such an intention, accompanying such an act, if established, would or would not be punishable by law? We do not conceive, however, that any serious doubt would be entertained, that any unlawful act, however slight, done with such an intention, referring, of course, to the future and not to the past, would be so punishable. But if any prosecution be contemplated, in respect of the letter now in question, it may be well to consider what was its true character. It is not impossible that such a letter was less a challenge than the prelude to one; something intended to be *followed* by a challenge, probably enough; but it may be doubted whether in itself it was a challenge. But, however this may be determined, we can have no difficulty in expressing our regret, that such a letter was sent or written. To say the least, upon the evidence at present before us, it is uncalled for and unprovoked.

According to Mr. *Lowe*, he introduced Mr. *Macdermott's* name into the Debate, referred to in the letter, with no design whatever to affront him, or to hurt his feelings, and in connection only with a supposed intention on the part of some other member, to bring the Defendant's name before the House, more prominently. Under such circumstances, the letter was an improper one; and, however polite in terms, would naturally be regarded by the party, to whom it was addressed, as an attempt to interfere with, and call him to account for, the exercise by him of that privilege, to which every member of the Legislature is unquestionably, and ought to be, entitled. It would be vain and idle to suppose, that the great duties of a legislator could be discharged, in this colony or elsewhere, with safety to the individual, or advantage to the country, if freedom of speech were not secured to him. But it would be as idle to call this secured, if he were afterwards exposed to question for using that freedom. It is, however, one thing, to admit unqualifiedly that such privileges exist, and another thing to hold, which we certainly shall not, that to call in question the proceedings of a legislator, or even to demand an explanation of them, or apology for them, is *indictable*. The right itself, of perfect freedom of speech in debate, and the importance of maintaining that right unimpaired, few will, I should think, seriously question. All freedom may, no doubt, degenerate into licentiousness, but in our impatience of one evil, we should be careful not ourselves to create another, much more serious. It is enough now to say, however, that the privilege of which I have

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spoken exists, and we must add, that no person who believed it to be assailed, being himself one of its depositories, not for his own benefit, but that of the community at large, would have been justified in placing it in peril, as Mr. *Lowe* was invited to do. We regret, however, if this was believed by him to be his position, that he did rest alone on that ground, instead of adding references, which (whether meant to reach the ears of the questioner, or not,) were not such as we feel at all disposed, in any point of view, to commend. On the other hand, we feel equally called on to express our disapproval of the imputations so unnecessarily cast on Mr. *Lowe* during the argument, by one of the defendant's counsel, imputations for which we can discover no sufficient ground.

We have desired to look more favourably on the case of Dr. *Macfarlane*, than that of the other defendant. But, after giving both cases all due consideration, we feel compelled to deal with them alike. We give Dr. *Macfarlane's* assertion full credit, that he went with pacific intentions. But almost every second in a duel, we make no doubt, referring to his first interview, at which he was probably the bearer of a civil note only, might be able conscientiously to say the same. Dr. *Macfarlane* can hardly be ignorant that such letters are in fact of a hostile character, and that he so regarded this is evident from the question put by him to his principal, as to withdrawing. Nor can we overlook on this occasion (though the Court has not now to determine that case, his conduct on the following day, when he so inconsistently accompanied another party, on an errand which, without here saying anything as to the character of its proceedings, it is enough to observe was certainly throughout *unequivocally hostile*.

On the whole, therefore, although we discharge the rule as against both defendants, we think it our duty to do so in respect to each, without costs.

Rule discharged, without costs.

MACDERMOTT v. DEVELIN. (1)

1845.

*Resident Judge at Port Phillip—Power to direct writ to the Sheriff of N.S. Wales—
Auxiliary jurisdiction—4 Vic. No. 22, s. 13—5 Vic. No. 9, ss. 1 and 9.*

April 21.

Stephen C.J.
Dickinson J.
and
a'Beckett J.

The Resident Judge of Port Phillip is a Judge of the Court of New South Wales, and in that capacity has an exclusive original jurisdiction in his district, but he has also an auxiliary jurisdiction in New South Wales, and has power to issue writs of execution to the Sheriff, in Sydney, to enforce his judgments, under 4 Vic. No. 22, s. 13, and 5 Vic. No. 9, s. 9.

MOTION to set aside a writ of *feri facias*, issued herein by His Honor the Resident Judge of Port Phillip, and the direction thereof to the Sheriff of New South Wales.

The facts appear in the judgment of the *Chief Justice*.

Broadhurst, in support of the motion.

Windeyer, *contra*.

Cur. adv. vult.

Judgment was delivered by—

THE CHIEF JUSTICE. This was a motion to set aside a writ of *feri facias*, issued by the Resident Judge of Port Phillip, and directed to the Sheriff of New South Wales; or failing that, to restrain the Sheriff from executing it, on the ground, that there was no authority vested in the Resident Judge, in any case, or at all events in this case, to issue a writ so directed.

It appeared from the affidavits, that the plaintiff originally obtained judgment in this Court, at Sydney, and that he then, under 5 Vic. No. 9, s. 6, caused a memorial of such judgment to be transmitted to Port Phillip—whereby it became equivalent to, and capable of being acted upon as, a judgment of the Court there. The plaintiff accordingly took out execution thereupon at Melbourne; under which the Deputy Sheriff took certain property, as the property of the defendant. A third party claiming that property, the case was brought before the Resident Judge, under the Interpleader Act, and the result of the matter was, not only the release of the property, but an Order, that the plaintiff should pay the costs of the proceedings. That Order, if wrong, might have been appealed from, but we must now deal with it, as a subsisting

(1) *The Sydney Morning Herald*, Jan. 21, April 22, 1845.

1845. and valid Order, which the Judge had power to make, and properly
 MACDERMOTT made under the circumstances. It is to enforce that Order (it having
 v. been previously made, we presume, a Rule of Court), that the writ of
 DEVELIN. execution now in question was issued.
 Stephen C.J.

It appears, that in fact the plaintiff was never resident at Port Phillip; and it was contended that the Resident Judge had, therefore, no jurisdiction over him—the provision in section 1 of 5 Vic., No. 9, being relied on for this objection. We are of opinion, however, that that section relates only to cases of *original* jurisdiction; and to persons who may, compulsorily, be made subject to it. The plaintiff here brought himself within the Port Phillip jurisdiction, for all the purposes of the judgment which he caused to be obtained there. The circumstance of his not having originally commenced the action there, we think makes no difference. That each branch of the Court, notwithstanding the exclusive original jurisdiction which we have referred to, has power to issue writs of execution to enforce its judgments, as well as writs of *subpoena* to compel the attendance of witnesses, in every part of the colony, is clear from the 4 Vic., No. 22, s. 13, and the 5 Vic., No. 9, s. 9. The former gives the power in the plainest terms; and the latter (being the section next preceding the power, as to transmitting memorials of judgments), expressly declares that it shall continue, the same as if that Act had not been passed.

The only question is, therefore, whether that branch of the Court, which issues a writ of execution in any such case, should or not direct it (or may not direct it) to the officer who ordinarily executes the process of the Court, in the place or district to which it is sent. We are of opinion, that the writ may be so directed, and we strongly incline to think, that it ought to be. However anomalous it may be that the same Court should be holden, under the same name, at two distant places at one and the same time, it is plain from the tenor of both Acts, that there is but one Supreme Court for New South Wales. The Resident Judge at Port Phillip, is a Judge of that Court. It is in that capacity that he is capable of being clothed with the exclusive original jurisdiction referred to. But he has also an auxiliary jurisdiction, which he may exercise in Sydney. The Judges here, in aid of *their* exclusive original jurisdiction, may exercise the same auxiliary jurisdiction at Port Phillip. The Sheriff, then, being the officer of this Court, seems to us as much under the authority of the Port Phillip Judge, for all purposes within that Judge's jurisdiction, as he is under the authority of the Judges in Sydney, for all purposes within their

jurisdiction. It might, perhaps, have been supposed, that the Resident Judge could direct writs of execution, in these cases, to some officer appointed by himself. But, independently of other objections, the Charter directs that all process shall be executed by the Sheriff; and the Port Phillip *Deputy* Sheriff (supposing the proper form of direction, *there*, to be to him, and not the Sheriff), has no jurisdiction beyond that district.

1845.
MACDERMOTT
v.
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Stephen C.J.

Rule discharged, with costs.

1845.

DOE *dem.* WALKER *v.* O'BRIEN (1).

April 21.

S. C. *sub nom.* DOE *dem.* MAZIERE *v.* O'BRIEN.

Stephen C.J.
Dickinson J.
and
a' Beckett J.

Ejectment—Sheriff's sale—Right, title, and interest—54 Geo. III, c. 15—Grant subsequently issued to debtor—Presumption of due execution of writ.

The defendant, a judgment debtor, being in occupation of a certain farm, which was sold by the Sheriff under 54 Geo. III, c. 15, after an (alleged) seizure, obtained a grant from the Crown. *Held* the Sheriff cannot sell more than he has taken in execution, and that the subsequent issue of a grant to the judgment debtor does not give the purchaser a legal estate. The Sheriff cannot convey more than he has sold (*semble*). The Court, on the proof of the fact of such sale, will not presume that the Sheriff did his duty, by duly levying before the expiration of the writ, in favour of a plaintiff in ejectment who is bound to establish his title.

THIS was a motion for a non-suit or a new trial in an action of ejectment, in which the plaintiff claimed as purchaser from the Sheriff. The defendant was the judgment debtor who subsequently entered and ejected the purchaser. The grounds of the motion were as follows :—First, that the plaintiff had failed to make out his title by proving a due levy by the Sheriff; second, that before the Sheriff made his levy, the writ of *fi. fa.*, under which the levy purported to have been made had expired; third, that the plaintiff had wholly failed to make out the identity of the lands sold by the Sheriff with those claimed by the present action; fourth, that a grant from the Crown to the defendant had issued subsequently to the sale and prior to the conveyance by the Sheriff to the lessor of the plaintiff; and other grounds of wrongful reception of evidence, &c.

Broadhurst and Darvall, in support of the motion.

Foster and Windeyer, for the plaintiff.

Cur. adv. vult

The judgment of the Court was delivered on April 21 by—

THE CHIEF JUSTICE. This was a motion, on certain points reserved, for the entry of a nonsuit. The cause was tried before the Chief Justice in May last, when the case appeared to be as follows: The subject

(1) *The Sydney Morning Herald*, Jan. 22, April 22, 1845; *The Australian*, April 22, 1845.

of the action was a farm, near Parramatta, formerly the property of the defendant, purchased by the lessor of the plaintiff, at a Sheriff's sale, in the year 1831. The judgment under which that sale took place, being against the now defendant at the suit of one Taylor, was recovered on the 23rd July, 1831. A writ of *feri facias* issued immediately on that judgment, returnable on the ensuing 25th August, and under that writ, in pursuance of the statute 54 Geo. III, c. 15, authorising the sale of lands in this colony for debt, the farm in question, then in possession of or claimed by the defendant, was sold by the Sheriff, on or about the 13th of October following. Whether there was, at any time, an actual levy made on the land, was in dispute; but the fact of seizure at any time prior to the sale was certainly not proved, although an advertisement from the Sheriff's Office was put in stating the levy, and notifying the intended day of sale. The bailiff's assistant, however, by whom it was supposed that the levy had been made, was unfortunately dead; so was the sheriff; and so was the plaintiff's attorney, by whose instructions, it appeared, the sale had on one occasion been postponed. The bill of sale from the Sheriff to Maziere was given in evidence, bearing date the 29th October. It recited the fact of a levy, but did not mention its date, and stated the sale to have taken place on *or about* the 13th October. Shortly after the sale the plaintiff was put in possession, and in that possession he has ever since remained until recently, when the defendant dispossessed him.

The defendant's counsel applied for a nonsuit, on the ground of the defect in the proof respecting the levy, and also on another ground (on which, however, they did not much insist) that there was a defect in the proof as to the identity of the premises. As to the first of these, the plaintiff's counsel answered, that it must be presumed that the Sheriff did his duty; and, therefore, as he *sold* the *farm*, that he had duly levied on it; but that, at all events, the Court would so presume, against this defendant, he being the defendant in the original action, who would be able to show how the facts were. The first was reserved; and the second went to the Jury. The defendant then, in answer to the action, gave in evidence a grant to him from the Crown, *dated the 19th October*; which, although certainly prior to the Sheriff's conveyance, was *six days after the supposed date of sale*. Subject to the question which arose on this, whether the Sheriff could, in law, convey to a purchaser under him, any greater estate or interest than that on which he levied, or at all events than that which he *sold*, and also subject to the point first mentioned,—the Jury found for the plaintiff.

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We have fully considered this case ; and are of opinion that a non-suit must be entered. Whatever claims a purchaser under the Sheriff may have under circumstances such as those which have been stated, it is sufficient to say that we could not, in this branch of our jurisdiction, give effect to them. The plaintiff in ejectment must establish a *legal title*, and this, the plaintiff has here failed to do. To that title we conceive that in a case of this kind, two things are essential : first, a seizure, and secondly a sale. The latter was certainly shown ; but, if we assume the former to have been shown also (that is not only a levy, but a levy pending the writ), the question still remains *what was sold* ! No more, we apprehend, at all events, than the defendant *then* had, all his then "right, title, and interest." It was urged by Mr. *Foster*, that the sale took no effect till the *conveyance* ; and that the Sheriff, therefore, then transferred to the purchaser the legal estate, which had been acquired in the interval. We cannot adopt this argument. The Sheriff could convey, we think, no more (*i.e.*, no greater interest) than he sold. But it was contended that the *sale itself*, as well as the conveyance, might have been after the grant ; for that, as the date of sale was not absolutely fixed, it might have been on or after the 19th, instead of on the 13th October. It may have been so, no doubt ; but if it had been, the plaintiff should have shown it.

There would then, however, have been still a question ; whether the Sheriff could *sell* more than he *took in execution*. On this, as on the other points, our opinion is with the defendant. Assuming the levy to have been made before the return of the writ (and if not, it was illegal), the Crown Grant was certainly then not issued. The defendant's title, therefore, at the most, at that period, was merely to *have a grant made* to him. The plaintiff considered, perhaps, that because the defendant claimed the land, the *land itself* was taken. But it appears clear to us, that no more was taken than the defendant's *then interest* in the land.

If that interest had been only leasehold, no more than a leasehold interest could have been transferred. Any larger estate or amount of interest, subsequently acquired, would not have passed to the purchaser. So here, there being only an equitable interest, no more than an equitable interest was transferred. The Sheriff's title is gained by *seizure*. It thence seems to us to follow, that whatever estate or interest the defendant then has in the thing seized, and no more, can be disposed of by him.

We may mention that we have referred to the cases of *Smallcomb v. Cross* (2); *Payne v. Drew* (3); *Woodland v. Fuller* (4); and *Right d. Jeffreys v. Bucknell* (5); which, so far as they go, support the opinions here given. On neither of the main questions, however, determined by us, have we been able to find any decision.

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Nonsuit granted.

(2) Lord Raym., 252.

(3) 4 East, 538.

(4) 11 A. & E., 866.

(5) 2 B. & Ad., 282.

1845.

REGINA v. WELDON. (1)

Jan. 30. *Carnally knowing a child under ten years—1 Vic., c. 85, sec. 11—Verdict of Assault.*

Stephen C.J.
Dickinson J.
and
a'Beckett J.

The prisoner was indicted for carnally knowing a child under ten years of age, under the provisions of 9 Geo. IV., cap. 31, sec. 17, and being acquitted by the Jury on this charge, was found guilty of a common assault, without the child's consent, in accordance with 1 Vic., c. 85, sec. 11, which provides "that upon the trial of any person, for any *felony whatever*, when the crime charged shall include an assault against the person, it shall be lawful for the Jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding.

Held, that the conviction was wrong, since an assault on the person is no legal ingredient in the offence charged.

The fact that the child *resisted*, would not the less have made the prisoner guilty of carnal knowledge, if the offence had been completed, although he might have been equally amenable to trial for rape (*per the Chief Justice and a'Beckett, J., Dickinson, J., dissentiente*). (*per Dickinson, J.*) If the offence had been completed the proof of an assault would have made the prisoner guilty of rape, and entitled to an acquittal on this charge.

THIS was a motion in arrest of judgment.

The facts appear in the note, *supra*.

Purefoy, for the prisoner, cites *Regina v. Day* (2), and *Regina v. Banks*. (3)

The *Attorney-General*, *contra*.

Cur. adv. vult.

The judgment of the Court was delivered by—

THE CHIEF JUSTICE. The prisoner was tried before His Honor Mr. Justice *Dickinson*, at the last criminal sessions, for the capital felony of carnally knowing a child under ten years of age. The proof required to support this charge being defective, His Honor directed the Jury to find the prisoner guilty of an assault, reserving for the consideration of other Judges whether such a verdict could be supported under the provision of 1 Vic., c. 85, sec. 11. This enacts "that on the trial of any person for any felony, *where the crime charged shall include an assault against the person*, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence should warrant such finding."

(1) *The Sydney Morning Herald*, Jan. 29 and 31, 1845.

(2) 9 C. & P., 724.

(3) 8 C. & P., 574.

On the point being mentioned to the Court, they were of opinion that the prisoner could not be found guilty of assault, on the ground that *no assault was included in*, or necessary to be proved for the purpose of establishing the felony charged; and that, therefore, the assault proved was not touched by the section cited. At the request of the Attorney-General, however, the Court consented to hear the point argued, and assigned Mr. *Purefoy* as counsel for the prisoner. The argument took place last Tuesday, and the Court, after considering all that was then urged, have seen no reason to change their former opinion.

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There is certainly no direct authority upon the point, but the cases which bear upon it are all in favour of the conclusion at which we have arrived. In *The Queen v. Banks* (4), Mr. Justice *Patterson*, in summing up, says, "I am of opinion the offence" (which was a similar one to the present) "does not include an assault, and that you must either find the prisoner guilty of the whole charge, or acquit him." Again, the same Judge, in *Regina v. Crampton* (5), says, "I think that in order to convict a person of an assault under the 11th section of the statute 1 Vic. c. 85, it must be an assault which is the subject matter of the charge, and embodied in the charge." In answer to *The Queen v. Banks* it was said, that in that case there was consent on the part of the child, and therefore there could be no assault; but that in the present case, an actual assault having been proved (the child having resisted), the prisoner might be found guilty of that offence. But, with reference to the point now under consideration, consent or non-consent is immaterial. It is material undoubtedly as regards the fact of assault: for *The Queen v. Martin* (6) is an authority that if the child consents, the prisoner cannot be found guilty of an assault. But that decision does not imply, that if the child consent, a prisoner (*under an indictment like the present*) could be found guilty of an assault. In that case the prisoner had been acquitted on the capital charge; but there was a count for a common assault also, and it was under that count that he had been found guilty. In *The Queen v. McKue* (7), a prisoner was certainly found guilty of an assault, upon an indictment similar to the present; but (as Mr. *Greaves* observes in his edition of *Russell on Crimes*) the point does not seem to have been noticed. It does not appear in that case whether there was consent or not; but as we have before said, the point for our determination is, not whether the prisoner has committed an assault or not, but whether he can be found guilty of that assault *under this indictment*.

(4) 8 C. and P., 574.

(5) 1 C. and M., 600.

(6) 9 C. and P., 213.

(7) 8 C. and P., 641.

1845. And we think that he cannot, on the simple ground that an assault on
 REGINA the person is no *legal ingredient* in the offence of carnally knowing a
 v. child under ten years of age, and consequently, that the prisoner has
 WELDON. not (to use the words of the statute) been upon his trial for any such
 Stephen C.J. felony as "*includes in the crime charged*, an assault against the person.

His Honor who tried the case, was of the opinion (still retained by him) that the prisoner was entitled to acquittal altogether, on the ground that an assault in fact having been proved, the offence charged, if completed, would have amounted to rape. There is no doubt a distinction in the wording of the statutes, relative to "Rape," and "Carnal Knowledge of Children"; the word *rapuit* being only used in the former. The rest of the Court, however, are inclined to think that the fact of *resistance* in the child, would not make the person less guilty of the *carnal knowledge*,—which is the crime charged,—although he might have been equally amenable to trial for rape. The object of the statute, they conceive, was not to exclude cases of non-consent, but to include all cases of carnal knowledge, in the case of children, whether there was consent or not. Upon this point, however, it is not necessary in the present case to pronounce an opinion.

The judgment in this case must, for the reasons given, be arrested. The prisoner will however be detained, in default of bail, to answer an indictment (if preferred against him) for assault with intent to commit rape. He may be admitted to bail, before any two justices, himself in £50, with two sureties in £25 each. In the meantime, he is committed to his former custody.

Judgment arrested.

[EQUITY.]

WALKER AND OTHERS v. WEBB AND OTHERS. (1)

1845.

Court of Claims—5 Will. IV, No. 21—Fraud in obtaining Crown grant—Trustee.

Feb. 25.

a'Beckett J.

In 1803 S. obtained a lease of Crown land for twenty-one years, reserving rent, with a provision for the purchase of the fee simple, by the lessee, in which case the Crown undertook, in effect, to give a grant of the land to the lessee, or other legal proprietor. Plaintiff's claim was traced by various conveyances to S. In 1842 defendant, W., claiming as representatives of a devisee of S., after a reference to the Commissioners for Claims, under 5 Will. IV, No. 21, and recommendation by them, received a grant of the property in question. The evidence was held to show that plaintiffs were unaware of defendant's application, and that W. was guilty of fraud and concealment before the Commissioners. The grant contained the proviso "that the lawful rights of all parties, other than the grantee, therein named, in the land thereby granted, should enure and be held harmless, anything in the said grant to the contrary notwithstanding."

Held, W. had no *equity* as against the plaintiffs, and the grant having been made, not in pursuance of a mere promise, but a stipulation in a lease, W. must be declared a trustee for them. The decision of the Commissioners ought to be conclusive unless it be unconscientious for a person to retain the benefit thereof.

THE reserved judgment of the Court was delivered, Feb. 25, by—

A'BECKETT, J. The bill in this cause was filed by the heir-at-law and executors of *Edmund Harrison Cliffe* praying an account of the rents of certain land in possession of the defendant, *Webb*, and that he may be declared to have held the same as trustee for the plaintiffs, and be decreed to convey it to them.

The land in question is situated in Parramatta, and was originally leased by the Crown to one *Charles Steward*, under the hand and seal of Governor Sir *Thomas Brisbane*, for the term of twenty-one years, ending the 30th June, 1843. The land was let at a quit-rent of 6d. per rod, and it was provided by the lease "that the said *Charles Steward* should in no way either divide the said land or separate or partition off any part or parcel thereof, or directly or indirectly lease, let, sell, alienate, or transfer the same or any part thereof, or any buildings erected thereon, or any part thereof, without the license and consent of the Governor of the territory

(1) *The Sydney Morning Herald*, Feb. 26, 1885. Cited 9 S.C.R. Eq. 127; *Spenser v. Gray* (1848); *Clark v. Terry* (1853); *Smith v. Dawes* (1853); and *Cockcroft v. Hancy* (1858), *post*.

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for the time being, for that purpose first had and obtained, in any or either of which cases above-mentioned the said license was to be, and become absolutely null and void." And it was by the said lease further understood, "that in case the said lessee, his executors, administrators, or assigns, should be desirous hereafter of purchasing the fee simple and inheritance of the said land, he or they should be at liberty to do so on paying to the Crown for the purchase thereof, a fine equal to twenty-one years of quit-rent thereby reserved; or in event of the said lessee, his executors, administrators, or assigns, erecting on the said land such building as might be approved of by the Governor for the time being, according to a plan and specification thereof to be previously submitted to him for his approval, provided that the same should not be of less actual value and cost than £1,000 sterling, then, and in either of the said last-mentioned cases, a grant of the said land would be made to the said lessee or other legal proprietor of the said land."

By indenture of the 16th May, 1827, the said *Charles Steward*, in consideration of the sum of £450, assigned his interest in the term created by the lease, to *John Payne*. From him it was transferred to *Richard Charles Pritchett*, by deed poll, under the hand and seal of *William Carter*, the then Sheriff of New South Wales, bearing date the 17th January, 1829. The deed recites the recovery of a judgment by *Charles Abraham Wilson*, on the 15th November, 1828, in the Supreme Court, against the said *John Payne*; the issuing of a *fi. fa.* directed to the said *William Carter*, as Sheriff, commanding him to levy on the lands, &c., of *John Payne*, the sum of £454, in satisfaction of the said judgment; and that in obedience to the said writ, he, the said Sheriff, had caused to be put up for sale the land in question, and sold it to *Richard Charles Pritchett*, as the highest bidder, for the sum of £300. By indenture of the 11th May, 1829, *Pritchett* assigned his interest to *William Barnes*, in consideration of the sum of £400; and on the 14th July, 1830, *Barnes* demised the land by way of mortgage, to the plaintiff's testator, *Cliffe*, in consideration of the sum of £323. A further sum of £45 was afterwards advanced by *Cliffe* to *Barnes*, in consideration of which, and of the sum previously advanced, the latter conveyed to the former his equity of redemption in the land, by indenture of the 1st September, 1832. *Cliffe* died in November, 1837, leaving the plaintiff, *Anna Frances Cliffe*, his heir at law, having made a will by which he appointed the other plaintiffs his executors, two of whom *Thomas Walker* and *Samuel Ashmore*, have taken out probate of the will. On the 18th March, 1842, the defendant, *Richard Webb*, applied to His

Excellency Sir *George Gipps*, to purchase the land in question, "alleging," as the bill states, "that such application was made in pursuance of the power for that purpose given by the said *Deed Poll of the 30th June, 1823.*" This claim was referred by His Excellency to the Commissioners appointed under the Act of 3 Will. IV, familiarly known as the Court of Claims Act, intituled "An Act for appointing and empowering Commissioners to examine and report upon claims to grants of lands under the great seal of the Colony of New South Wales." The Commissioners accordingly considered the claim, and having reported in favour of it, a grant of the land was made to the defendant *Webb* and his heirs, upon certain trusts therein mentioned. This grant bears date of the 18th August, 1842, and purports to be made in compliance with the recommendation of the Commissioners appointed under the above mentioned Act.

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The grant, after specifying the land, describes it as "being the allotment leased to *Charles Stuart*, otherwise *Stewart*, by His Excellency Sir *Thomas Brisbane*, on the 30th June, 1823, but now granted in compliance with recommendation of the Commissioners, appointed under the Act of the Colonial Legislature, 5 Wm. IV, No. 21, in their Report on the case No. 1119, made on the 6th day of July, 1842, unto the said *Richard Webb*, upon the trusts mentioned in the will of *William Chadsworth*, bearing date the 18th day of May, 1842: and in further consideration of the sum of £29 18s. 6d. sterling, for, and on our behalf, by the said *Richard Webb*, paid as in the said lease covenanted to the Colonial Treasurer of our said territory, before these presents are issued, being a fine equal to the payment of twenty-one years quit-rent on the said allotment, in terms of the regulations of the 25th August, 1834," and there is a proviso in the grant, "that the lawful rights of all parties," other than the grantees, therein named, in the land thereby granted, should enure and be held harmless, anything in the said grant to the contrary, notwithstanding."

Shortly after the date of the grant, *Webb* took possession of the land, upon which the plaintiffs, who allege that they were ignorant of the proceedings before the Commissioners until the grant had been issued, demanded possession of *Webb*, which he declined to give up. At the same time Captain *Ashmore*, one of the executors, tendered him £48 9s. 2d. for the cost he had incurred in obtaining the grant, and offered to pay any other expenses he might have been put to; but *Webb* replied, "He knew nothing about it—the property was his." He admits in his

1845. answer to have taken possession on the 1st March, 1843; the demand
 WALKER and refusal took place in June following, and in July of the same year
 v. the present bill was filed.
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a'Beckett J. In addition to the facts already stated, and which were proved at the hearing, evidence was given of the Sheriff's sale to *Pritchett* by a witness who was present, and who stated that he did not remember anybody forbidding the sale. The same witness said he knew *Payne*, and remembered him in possession in 1828, and that after the Sheriff's sale *Barnes*, who had been *Payne's* agent, continued in possession for five or six years. A clerk from the Supreme Court Office produced the judgment roll in the action of *Wilson v. Payne*; and Mr. *Prout*, the Under Sheriff, in reference to the same matter produced two books from the Sheriff's Office called the *fi. fa.* and *ca. sa.* books, from one of which he read what he called "an entry of the sale under the *fi. fa.* issued in the case of *Wilson* against *Payne*. "He said it was customary to make such entries in these books when the writ was returned; that the entries were in the handwriting of the late Under Sheriff, Mr. *James*; that he had looked for the writ of *fi. fa.* in the cause of *Wilson v. Payne* but could not find it in his office. No other evidence was given on this point, but Mr. *Donnelly* requested I would refer the matter for enquiry to the Master, which I declined. In support of the other parts of his case the plaintiffs read from the answer of the defendant *Webb* an admission of his having applied for the grant, but that such application was made after he had given the usual three months' notice in the *Government Gazette*, to enter their *caveats* against his claim. He admitted, also, that the Commissioners had heard in the absence of the plaintiffs, the representations made by the defendant through his solicitor, on the subject of such claim—and that the original lease of the 30th of June, 1823 was not produced or shown to the Commissioners during the investigation of the said claim, or at any other time. The other defendants disclaimed by their answer, any interest in the matter; and no witnesses were called, nor any evidence given, either by them, or the defendant *Webb*.

The charges relied upon in the Bill as entitling the plaintiffs to relief were, First, the concealment by *Webb*, from the Commissioners of the Court of Claims, of the fact of the assignment from *Stewart* to *Payne*, and of the deeds subsequent thereto vesting the term in the plaintiffs. Secondly, the non-production before the Commissioners of the original lease of the 30th June, 1823. Thirdly, that the said lease had been and then was in the possession of the plaintiffs, and those under whom

they claimed ever since the period when *Stewart* conveyed to *Payne*. Fourthly, That the plaintiffs are the only persons entitled by virtue of the said lease to purchase the fee-simple of the land from the Crown, and that the grant made to the defendant *Webb*, was obtained by false suggestion or concealment of facts.

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The answer of the defendant *Webb* sets up a claim to the grant, as trustee for the parties named in the will of *William Chadsworth*, who it is alleged became entitled to the property as legatee of the original lessee, *Stewart*. It repudiates also the validity of the assignment from *Stewart* to *Payne*, as being in violation of the proviso in the lease, and on the ground that the consideration of £400, which it is alleged was to have been paid by £50 in cash, and the residue in promissory notes, was in fact never paid. In support of his own claim, the defendant *Webb* relied upon his grant, which was the only document produced by him at the hearing; the original lease came from the possession of the plaintiffs. As to the consideration from *Payne* to *Stewart*, one of the plaintiffs' witnesses, on cross-examination, swore that the money was to be paid by notes of hand from *Payne* to *Stewart*; that he had seen some of the notes in *Stewart's* possession some time after the assignment; that *Stewart* was supplied with provisions through the medium of *Payne's* agent, *Barnes*, and that these provisions and other matters were to be set off against the notes when payable. The attesting witness to the delivery of the deed by *Stewart* did not recollect the passing of any money at the time, but proved the mark of *Stewart* to a receipt indorsed on the deed for the full amount of the purchase money.

The case was argued before me on the 12th December last, Mr. *Donnelly* and Mr. *Windeyer* appearing for the plaintiffs, and Mr. *Foster* and Mr. *Broadhurst* for the defendants.

The points chiefly relied upon by the defendants, were, that the recommendation of the Commissioners, that the grant should be made to *Webb*, was, in the absence of fraud, conclusive in favour of the grantee; and that if not, the plaintiffs had failed in making out *their* title, by reason of the defective transfer of *Payne's* interest to *Pritchett*, under the Sheriff's sale. They contended also that the assignment from *Stewart* to *Payne*, was void, as being on the face of it, a transfer without the consent of the Crown. It was said also, that assuming the defendant *Webb* had attained the grant by false representations, still he was not liable in a Court of Equity as trustee, but the plaintiffs should have applied to the Crown for a *scire facias* on the ground that the grant had *improvidè emanavit*. It was contended also, that the defendant having

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priority at law, his Equity ought to have been *disproved* by the plaintiffs, before they could set up their own; and that, for that purpose, they ought to have shown that the defendant had notice of the plaintiff's claim to the land at the time of his acquiring a title to it through *Stewart*, and that no proof of such title was necessary on his part, for that in the absence of any proof by the plaintiffs to the contrary, it was to be presumed as against them, that he had purchased the property from *Stewart*. The objections to the Deed from the Sheriff, were, that it was unsupported by evidence of any writ of *fi. fa.* having been delivered to the Sheriff, or of any levy having been made under it, and that the recital of these facts in the deed was insufficient to prove them, as against the defendants. An objection was also taken, that the *Attorney-General* should have been made a party to the bill; and that the executors were improperly joined as plaintiffs, having no interest, and not suing in, the character of devisees.

The plaintiff's counsel answered, that as to the transfer from *Stewart* to *Payne*, without the consent of the Crown—the Crown alone could take advantage of it; and that as it had recognised the validity of the original lease in the grant to *Webb*, its consent to the transfer was to be presumed; or, at all events, that the right to forfeiture on that ground has been waived. He insisted that the Sheriff's deed was sufficient without proof of the *fi. fa.* or levy. And that, if not, it was no answer to the plaintiff's claim to relief against the defendant; moreover, that it was not a defence open to the defendant on the pleadings, as he had only set up by his answer that the consideration from *Payne* to *Stewart* had not been paid, an assertion which was disproved by the evidence. He contended that the property having been only personally during the lifetime of the testator, the executors were the only proper parties to sue. That as to the want of notice—the fact of the original lease being in the hands of the plaintiffs, which must have been known to the defendants—was equivalent to notice. And finally he contended, that so far from the decision of the Commissioners being conclusive, the claim not being founded on the *promise* of any Governor, ought not to have been sent to the Commissioners at all; but that, however it might be, the proviso in the grant, saving "the lawful rights of all parties," was sufficient to give the plaintiffs a *locus standi* in this Court.

The principal point for my determination is one of great importance, being raised, I believe, for the first time, and apparently striking at the root of titles, which may, perhaps, have been hitherto deemed as unassailable in equity, as at law. No general derangement of property,

however, need be apprehended from the exercise of the Court's equitable jurisdiction in the present case, for the same principles which make it reluctant to recognise any barrier in the way of a remedy for fraud, dispose it to uphold all transactions where rights have been *bond fide* acquired, or where it sees that a complaint, it might at one period have entertained, has lost its force, or rather its justice, from time, acquiescence, or the intermixture of other interests, than those originally concerned.

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Before determining the main question here raised, it may be as well to strip the case of its comparatively minor points. I think the *Attorney-General* is not a necessary party to the bill, though, I must confess, I was for a time, in much doubt upon that. But on reflection, I see no necessity for his appearance. The Crown has no interest in the land claimed, but has parted with the fee, on the assumption that the grantee is the legal proprietor of the land demised by the original lease of the 30th June, 1823. The plaintiffs contend that *they* ought to stand in that position, and the contest as to that, is between them and the defendant. The grant is already made, and the question is not now who shall be the grantee; but whether the plaintiffs are not entitled to stand in the place of the person adopted by the Crown in that character. No fraud has, in fact, been practised on the Crown, which acting upon the recommendation of the Commissioners, has intentionally, and advisedly, made the grant in question. For this reason I think the plaintiffs could have no remedy by a *scire facias*, for, to support that, there must be fraud or false suggestion from the grantee to the Crown, and that too in a more limited sense than is ascribed to those words in a Court of Equity. The objection too, on the score of violating the provisions of the original lease by transferring the land without consent, in the first instance from *Steward* to *Payne*, appears to me untenable. The true answer to it was, I think, given by Mr. *Donnelly*, and need not be here repeated. Equally unfounded, and for the reasons adduced, by the same learned counsel, was the objection that the executors ought not to have been made parties.

I now come to the more serious objection, and it is that which relates to the Sheriff's deed of sale to *Pritchett*, on the 17th January, 1829. It was contended that, as against a stranger, the *fi. fa.* and levy must be proved, and that a recital of these facts in the deed of sale was not evidence of either. But upon looking to the deed, I see no such recital, for nothing more is there stated than what I have already mentioned, viz., the recovery of the judgment against *Payne*, the issuing of a *fi. fa.*,

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directed to the Sheriff, to levy on his goods and lands, and the fact of his putting up for sale by auction the lands in question, "in obedience to the said writ of *fi. fa.*" As to the delivery of the writ, and the levy thereon, the deed is entirely silent. Mr. *Prout's* evidence amounted to this—that from an entry in one of the books in the Sheriff's office, he concluded there must have been a *fi. fa.* levy, and return. The judgment roll was produced, but no *fi. fa.*, nor was any account given of it, except by Mr. *Prout*, who said he had looked for it in his office, and could not find it.

In weighing, however, the strength of the objection to this part of the plaintiff's case, regard must be had to the nature of the question in issue, upon the bill, and to the relation of the parties between whom it is raised. I agree with Mr. *Broadhurst*, that where parties are equal in point of equity, those who have the advantage at law will prevail; and if this were the position of the litigants here, I might pause to consider whether this objection did not turn the scale in favour of the party who makes it. But how stands the case? *Webb*,—though, without the least evidence in support of his claim,—pretends to derive title, not from *Payne* but from *Stewart*; but if *Stewart* made a valid transfer of the land to *Payne*, what equity can arise to *Webb*, by the invalidity of any of the subsequent deeds, in the course of its transmission to *Cliffe*? His equity, therefore, fails *in limine*, for I am of opinion that the transfer to *Payne* was operative against *Stewart*, and that the evidence by which it was attempted to be impugned, entirely failed. Had *Webb* for a valuable consideration purchased from *Payne*, after the Sheriff's sale, he would have had some ground for setting up an equity with *Cliffe*—each claiming from the same source, would (in the absence of notice to either) have had equal equities—and the question of legal priority would, then, have properly arisen between them. But, looking to the objects of this bill, and the ground on which relief is asked, I do not think it necessary that the plaintiffs are driven to deduce their title in the same sense, and with the same strictness, which would be required in an action of ejectment. Their title is set out, not so much for the purpose of exhibiting its legal, as its equitable strength; nor with a view to enforce any right by means of the former, but to obtain some by means of the latter. For these reasons, then, I decline at the instance of the defendant, to cut short the plaintiffs' claim of title, by stopping at the deed in question, and for the purposes of this suit, hold, that it sufficiently transferred the interest to those under whom the plaintiffs now claim. At all events, it involves so much of law, that in the face of the equity in favour of the plaintiffs I will not take upon myself to decide otherwise.

This brings me to the substantial question between the parties, viz., whether the plaintiffs are entitled to stand in the place of the defendant as grantee of the land, by virtue of their title under the original lease, notwithstanding the decision of the Commissioners of the Court of Claims. It was said that, in the absence of fraud, that decision ought to be conclusive. The term fraud is somewhat comprehensive, but I will admit that, unless it be unconscientious for the defendant to retain the benefit of the Commissioners' decision, it *ought* to be conclusive. The Court, however, if it see reason to differ from that decision will not feel the same reluctance in disturbing it, as it might have done, if the grant in question had been made in pursuance of a promise, instead of a stipulation in a lease. I think Mr. *Donnelly* drew a very proper distinction between the two, and I am not prepared to say he was wrong in contending that the claim in question was not one, upon which the Commissioners should have decided at all. The section under which they are empowered to act, is at follows:—And be it further enacted, “That it shall be lawful for the Governor of the said colony, as often as to His Excellency shall seem fit, to refer the claims of all persons to have grants of land in due form of law executed to them, *in virtue and in performance of the promise* of any Governor for the time being, to the said Commissioners, to the end that all such claims may be duly examined and reported upon for the information and guidance of the Governor; and the said Commissioners, or any two of them, of whom the president shall be one, shall proceed to hear, examine, and report thereon, in manner hereinafter mentioned: Provided always, that nothing herein contained shall authorise the said Commissioners to receive or report upon any claims but such as shall be referred to them by the Governor aforesaid.” Now the grant in question is not made in pursuance of any promise, but of an absolute stipulation by deed that “the grant of land thereby leased shall be made to the lessee thereof, or other legal proprietor.” This is very different from a promise, in the sense in which that word is used in the section just cited, and requires very different kind of evidence to entitle a party to claim the benefit of it. A promise from the Crown would convey no legal title to the transferees into whose hands it might pass for value, and the 4th section therefore, of the Act goes on to enact, “That in hearing and examining all claims to grants *as aforesaid*, the Commissioner shall be guided by the real justice and good conscience of the case, without regard to legal forms and solemnities, and shall direct themselves by the best evidence they can procure, or that is laid before them, whether the same be such evidence as the law would require in other cases or not.” Now

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1845. surely it cannot be contended that this language applies to the case of a claimant under a lease, for the very nature of his claim requires legal evidence to support it: but if the kind of testimony mentioned above would be admissible, and the reception of any other is to depend on the discretion of the Commissioners, the "legal proprietor," (who is the only party contemplated by the Crown,) might, and in many cases probably would be, excluded altogether.

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If this be a correct view of the Act, the authority of the Commissioners' decision must go for very little in the present case; and indeed one can hardly pay much respect to it, when it seems that they never had before them, or thought fit to require the production of the very lease which gives rise to the claim. The grant which expressly refers to the lease, is made in pursuance of it, and could only have been made to *Webb* on the faith of his being "the legal proprietor" with whom alone the stipulation for the grant was made. If I see clearly, then, that *Webb* was not the legal proprietor—but that he has been represented in that character to the prejudice of the party who *was*; shall I allow him to retain such an undue advantage, because it has been obtained through the agency or recommendation of others? I should, at least, desire to see upon what facts that recommendation was based, before I could listen to any equity that is pretended to be set up by *Webb*. It appears that the Commissioners made a report, but the defendant has not thought fit to give it in evidence. His position, before *me*, therefore, is that of a person not having the least claim either at law or in equity to be the legal proprietor under the lease in question; and a perusal of his answer convinces me that, whatever case he may have made before the Commissioners, he has, in reality, none that this Court ought to recognise for a moment. The plaintiffs, on the contrary, are purchasers for valuable consideration, have had possession by those under whom they claim for several years; and produce from their custody the requisite title deeds, including the most important of all—the original lease of the 30th June, 1823. It is said there was no concealment on the part of *Webb* in his proceedings before the Court of Commissioners, three months' notice having been given by him in the *Gazette*, of his claim. But a notice of this kind, which he was obliged to give to answer his own purpose, can form no test of *bona fides*, especially when we consider that if his object had really been to invite the attention of the plaintiffs, he might have done so by means less doubtful of attaining that end, than the medium of a public advertisement. But it is impossible to look at *Webb's* answer, and not be convinced that there has been both concealment and misrepresentation

before the Commissioners. He does not disavow his knowledge of the existence of the deeds under which the plaintiffs claim, but denies that he concealed the knowledge of them from the Commissioners, because as he says, "His solicitors who conducted his claim before the said Commissioners, informed them of the fact of there having been executed some deed *purporting* to be a deed of assignment from the said *Charles Stewart* to the said *John Payne*, but which had never been consummated by the payment of the consideration." Here then is a false suggestion, for there has been ample evidence given to satisfy me that the assignment alluded to was consummated. As to the original lease, he admits it was not shown to the Commissioners, "such production," as he says, "not having been required by the nature of the proceedings before the Commissioners, and the circumstances under which the same was conducted." This gives a pretty good clue to the kind of evidence which was entertained by the Commissioners; though one can hardly imagine *any* circumstances, which, consistently with equity and good conscience, could justify the exclusion of evidence so material to the claim made, as the production of these documents would have furnished.

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There remains only one point to determine. It was argued by Mr. *Foster* that, admitting the defendant *Webb* to have obtained the grant by false representations, he could not be dealt with as a trustee for the plaintiffs, not sustaining any fiduciary character in regard to them. In support of this view he cited *Nesbitt v. Tredennick* (2). The circumstances of that case have no bearing upon this, for the ground of that part of the decision, for which it is cited, was that the rights of the plaintiff had been extinguished both in law and equity, at the period when the property in question came into the possession of the party sought to be charged as trustee. But here the lease under which the plaintiffs claim, does not expire until June, 1843, whilst the grant was obtained in August, 1842. But were it otherwise, the defendant here is not sought to be made liable, on the ground of his sustaining any fiduciary relation towards the plaintiff. That is not the head of Equity, under which relief is sought against him. What the defendant is charged with, is unconscientious retention of an advantage which has been obtained to the prejudice of the plaintiff's rights, and until he surrenders it, the Court will consider him in the position of a trustee, not on the ground of any *fiduciary* duty, but for the purpose of compelling him to discharge that which it considers, on his part, to be a *conscientious* one.

(2) Ball and Beatty, 29.

1845. "The Court" (says Mr. *Jeremy*, in his work on Equity Jurisdiction, p.

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94) "will imply a trust upon what it ascertains to be the conscientious duty of a party, and will, in accordance with its general principles, compel him to the performance of that which natural justice demands." It is upon this principle I decide this case—a broad principle, I admit, but one which, in a Court of Equity, would be nugatory, if it were not capable of embracing every state of circumstances in which it could be fairly applied. In seeking to apply it here, I ought not to be deterred by the absence of any cases in point: for in a colony like this, it is inevitable that contracts and dealings will take place, for which no analogy can be found at home. In such cases, whilst we look for our guidance to English law, it is better to risk the misapplication of one of its principles, than of rejecting it altogether. Erroneous application could affect only the particular case, and would be capable of a remedy; but non-application might work unknown mischief to a thousand others, without hope of appeal or redress. We must look in administering either law or equity, to the circumstances of the colony; if the present case is new, its novelty is no reason why the Court should not deal with it, and, if necessary, mould its decision according to its peculiar exigency. In so doing, I but follow the rule laid down by Lord *Cottenham*, who in the case of *Taylor v. Salmon* (3) makes these remarks:—"I have before taken occasion to observe, that I thought it the duty of this Court to adapt its practice and course of proceeding as far as possible to the existing state of society, and to apply its jurisdiction to all those new cases which, from progress daily making in the affairs of men, must continually arise, and not, from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice, and to enforce rights for which there is no other remedy."

These remarks are peculiarly applicable to the circumstances of this colony, and are sufficient justification, if I wanted any, of the principles upon which I decide the present case. I have only to add, that for the reasons already given, I think that the plaintiffs have made out their equity, and that they are entitled to a decree as prayed.

Declare plaintiffs entitled to the land in question—and that *Webb* is a trustee for them. Decree an account of all moneys received by *Webb*, the other defendants not appearing to have received any, and of all expenses paid by him in procuring the grant. As against the other defendants the bill will be dismissed with costs from the time of their disclaimer. As to *Webb* reserve the costs for further directions.

[IN INSOLVENCY.]

In re HUGHES, *ex parte* TERRY. (1)

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Insolvency—5 Vic. No. 17, sec. 55—*Reputed ownership*—"Possession, order, or disposition"—"True owner"—Share certificates standing in name of insolvent.

Jan. 29.

Stephen C. J.
Dickinson J.
and
a'Beckett J.

An insolvent, H., having been indebted to T. had deposited with her certificates of shares in a certain company. T. afterwards assessed the value of the shares and proved for the balance of the debt against H.'s estate.

H. had, however, after the deposit, continued to receive the dividends of the said shares, and to vote at meetings of the shareholders. On application by T. that the trustees of the estate of H. should transfer the shares to her, *Held* that the term "true owner" in sec. 55 of the Insolvent Act, indicates the person *beneficially* interested, and that T. had forfeited her right to succeed by allowing the order and disposition of the shares to remain in the Insolvent, as reputed owner. Reputed ownership is a matter of fact, to be collected from all the circumstances, and not to be inferred from want of notice alone.

APPLICATION by *Rosetta Terry* for an order directing *John Walker*, one of the trustees of the estate of *John Terry Hughes*, to execute a transfer to the said *Rosetta Terry* of certain shares in the Hunter River Steam Navigation Company.

Foster and *Windeyer*, in support of the application.

The *Solicitor-General* and *Fisher*, *contra*.

Cur. adv. vult.

The judgment of the Court was delivered by—

March 5

The CHIEF JUSTICE. This was an application to the Court, in its Insolvency Jurisdiction, under section 39 of the Insolvent Act, on behalf of *Rosetta Terry*, that the Trustees of this Estate should transfer to her one hundred shares, possessed by or standing in the name of the Insolvent, in the Hunter's River Steam Navigation Company. The application was, according to our present ordinary practice, by *Motion*; which was heard before the full Court, on the 29th January last:—and the facts, as they appear from the affidavits on either side, are the following.

The Insolvent, being indebted to *Mrs. Terry* in the sum of £913, for money collected by him on her account, "for a period of time ending in the month of July, 1843," deposited with her the *Certificates* of the

(1) *The Sydney Morning Herald*, Jan. 30, March 7, 1845.

1845. shares in question, which, on the occasion of her proving her debt before the Chief Commissioner, she valued at £770. She thus treats the deposit as one made by way of security for her debt. She does not expressly say, however, that the certificates were so deposited; nor does she state when, in fact, they were deposited. Her statement is, merely, that the sum is *partly secured by deposit*; and no further information is afforded. The estate of the insolvent was sequestrated on the 7th September, 1843. Her claim on the estate was for the sum of £143 only; being the balance, remaining uncovered by any security. The claim was allowed by the Chief Commissioner; and no appeal against his decision, as provided for by s. 36 of the Act, was presented.

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It appears, that all certificates of shares in the Company bear on them a memorandum, that no *valid transfer* thereof can take place unless the certificate be produced at the Company's office, and the transfer be registered in the assignee's name, under the approval of the Directors. And, by a clause in the Company's Deed of Copartnership, the person in whose name any share is held, shall to all intents be deemed the absolute owner; and shall be the only person recognised by the Company, relating to such share. But, according to the Manager, no notice was ever given to him, (or to the Directors, to the best of his belief), of any transfer of the shares now in question; nor has any legal assignment of them, from the Insolvent taken place; nor has any change ever been made in the books of the Company as to the proprietorship of the shares; nor has the Manager any knowledge, of the interest or lien claimed by the present applicant; but the Directors consider the insolvent, or his trustees, as the only lawful owner or owners of the shares; and, until his insolvency, the Insolvent always acted as the proprietor of them, by voting at the Company's meetings, and receiving from time to time the dividends.

By the section under which the motion was made, it is enacted that any creditor, who shall hold any *security* or *lien*, on any part of the insolvent estate, shall, in his affidavit of debt, put a *value* upon such security, and deduct such value from the debt proved, and the trustees shall then have an *option*, either of taking an assignment of the security on payment of the estimated value out of the first assets, or "*of reserving the full effect of it to the creditor*,"—who in either case is to be ranked on the estate, for the balance of the debt so ascertained. The claimant here, therefore, having proved her debt as stated, and put a value upon her security, real or supposed, calls on the trustees to exercise that option, by either paying her estimated value, of the one

hundred shares, and taking an assignment of them, or by *relinquishing them wholly to her*—which, it is contended, was the alternative contemplated by the section, where the Trustees decline to avail themselves of the security. With this application, two of the Trustees are willing to comply, but it was opposed by the remaining Trustee, on several grounds.—First, it was insisted that the section cannot be construed, as contended for by the applicant. Secondly, if that be the construction, yet the Court possesses no summary jurisdiction, in such a case, but the party must be put to her suit in equity. Thirdly, even if the Court could exercise such a jurisdiction, in an *ordinary* case or mortgage, it has it not in a case of this kind, where there exists, at most, an equitable claim merely. Fourthly, objections were raised to the mode of proof, the claim being established only, if at all, by the party herself—and that, it was submitted, in a very loose and suspicious manner. Fifthly, it was insisted, that the claimant had at all events, as against the Trustees, forfeited all claim, by having permitted the Insolvent, within the meaning of the 55th section of the Act, to remain and be the *reputed owner* of the shares, and to have the “*possession, order, or disposition*” thereof. Sixthly, it was maintained that she must make out, in any event, an absolute and perfect right to the transfer, but that here none could take effect, without the sanction of the Directors, whose discretion this Court had no power to control.

Of these objections, the fifth appears to us to be decisive of the case, against the applicant. The terms of our local Act, in the section relied upon for this objection, are the same as those in the 72nd section of the Bankrupt Act, 6 Geo. IV, c. 16. The decisions of the Courts at home, therefore, on the subject of “reputed ownership,” under that Statute, may be relied on as conclusive on this question. The enactment is, that if the insolvent, at the time of his insolvency, shall, by the consent of the true owner, have in his possession, order, or disposition, any goods or chattels, whereof he was reputed owner, the Trustee shall have power to dispose of the same, for the benefit of the estate. It was contended by the very learned counsel for the claimant, that in this case the *order or disposition* of the shares never was, in the insolvent, and for this he cited *ex parte Plant*, 4 Dea. and Ch. 166. *Ex parte Warner*, 19 Ves. 202, was also referred to. On the other hand, he maintained that *Rosetta Terry* was not their *true owner*; inasmuch as she never had the legal power to dispose of them. He distinguished between the *shares* and the *certificates*; and contended that, although the latter passed to *Mrs. Terry*, yet the former always were in the Insolvent. It appears to us, however, notwithstanding the cases mentioned, that those relied

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1845. on for the trustees, or referred to by ourselves during the argument, are too strong to be overcome. *Nelson v. London Assurance Company* (2); *West v. Reid* (3); *Ex parte Vallance* (4); See also *Ex parte Lancaster Canal Company* (5); *Ex parte Waithman* (6); *Williams v. Thorp* Stephen C.J. (7); *Ex parte Richardson* (8); *Ex parte Harrison* (9).

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If the distinction is to be maintained between the *certificates* and the *shares*, and the former are not to be considered as symbols of the latter, and (for the purposes of this motion,) identical, we apprehend that the application would then fail on another ground. On the suppositions that they are things essentially different, and independent on each other, the applicant has already got all that she is entitled to ask for. But the view which we take of this case is, that within the meaning and for the purposes of the 55th section, the "true owner" of the Shares must be taken to be the *Mortgagee*; which is the character, substantially, in which Mrs. *Terry* claims. Whether she is legally or equitably Mortgagee, is (as to this point) immaterial. And we are of opinion, that the "order or disposition" of the Shares, or at least their "*possession*," which is one of the words used in the section, has always been, within the meaning of the same section, in the *Insolvent*, who, by her consent, continued up to the insolvency to be their "reputed owner." The Shares, consequently, will pass to the Trustees, under the provisions of that section, for the general benefit of the creditors.

A review of the cases will show, that the term "true owner" is used, not as indicating a person who has the legal title, but the person who is or was intended to be *beneficially* interested, in contradistinction to the person *apparently* interested only. Were the legal title necessary, the deposit of an Instrument, or of Title Deeds, would not be within the Statute. But many of the cases, in which the question of reputed ownership has arisen, are of this class. The first which we shall mention is that of *Ex parte Vallance* (10) cited by Mr. *Fisher* for the Trustees. The Petitioner there claimed, as Equitable Mortgagee of certain shares in a Gas Company, the Certificates of which had been deposited with them by the Bankrupt, and the Petition was, that the shares might be sold, and the petitioner be allowed to prove for the deficiency. By the Deed of Settlement, all transfers of Shares were to be entered in the Company's books, and no person was to be entitled as transferee whose name was not so entered. No transfer appears to have been made, and

(2) 2 Sim. & St. 292. (3) 2 Hare 249. (4) 3 Mont. & Ayr. 224, and 1 Jur. 359.
(5) 1 Deac. and Chit. 411. (6) 4 Deac. & Chit. 412. (7) 2 Sim. 257. (8) 3 Deac.
496. (9) 3 Deac. 185. (10) 3 Mont. & Ayr. 224; and 1 Jur. 359.

no notice was given to the Company. That case, therefore, very closely resembles the present. The Assignees opposed the petition, on two grounds, of which the first is immaterial to this question. The second was, that the shares were in the order and disposition of the Bankrupt, as reputed owner. The Petitioner insisted that they could not be so considered; because no valid transfer could take place, without production of the certificates at the Company's office. It was held, that the Shares remained in the order and disposition of the Bankrupt. And, *per Erskine*, C. J., "whether the Petitioner's claim was to be considered one of *defective title*, or he was to be considered the true owner of the shares, by virtue of the *deposit*, he had equally failed in making out his case." The Petition was, therefore, dismissed. We have not seen the report in *Montagu and Ayrton*, and that in the "*Jurist*" is evidently loose and incomplete. But it may be collected, that no difficulty was as to ownership, *within the meaning of the Statute*. Had there been no "true" owner, within that meaning, who could either permit or prevent, (by giving notice, or otherwise), the *reputation of ownership in the bankrupt*, the question as to "order or disposition" in the latter, was wholly out of place.

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As to reputed ownership, in the present case, (which, where disputed, is a matter of fact, to be collected from all the circumstances, and not to be inferred from want of notice alone (11) 962, and 2 M. D. and D. 711) there was no question. But Mr. *Foster* replies on *ex parte Plant* for the position maintained by him, that nevertheless those shares were not in the bankrupt's or disposition. That case was not one of mortgage or deposit, but simply of lien, created by a co-partnership deed, as between the Company and its partners. The bankrupt was a partner in a banking company, and, at his bankruptcy, was indebted to them for advances made him. The deed of settlement provided, not only (as here) that no share should be transferred without the consent of the Directors, but that the shares of each member should be liable, in the hands of the Company, for debts due by the Company to others, and also for all debts which might be due to the Company, individually, by him. The Assignees contended, however, that the shares passed absolutely to them, under the statute, as being in the bankrupt's reputed ownership, and possession, order, or disposition. But, it appearing that an abstract of these clauses was endorsed, *on the share certificates*, the Court held that that was notice sufficient, to all the world; the lien, or

(11) See *Edwards v. Scott*, 1 Man. and Cyr. 962; and *ex parte Heathcote*, 2 M. D. and D. 711.

1845. *condition* (as it was termed by *Erskine, C. J.*), on which the shares were held, appearing "on the face of the very document, which is the symbol of ownership." It was insisted, for the Assignees, that the doctrine of reputed ownership attached because the bankrupt appeared as owner, not only on the books of the Company, but in returns made to the Stamp Office, and by possession in him of the certificates. But the Court thought, most reasonably, as it appears to us, that there was no pretence for the claim, which indeed had failed in all points. To bring the case within the Act, it was necessary to make out, not only that the bankrupt was *reputed* owner, *as against* (or in contradistinction to) *the company*, who for this purpose were to be deemed the *true* owners,—but that he had the possession, or order and disposition relied on, *by their consent*. But the Bank, it was plain, had done all in their power to prevent any such reputation from attaching, to any of their partners, and they left no possession, or disposition, in the bankrupt, which was not clogged with notice of the condition, subject to which alone he held, or could exercise it.

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That case, therefore, is clearly distinguishable from the present. The decision was, according to the report, that the bankrupt was not *reputed* owner of the shares; not, that they were *not in his order or disposition*. But the true ground would rather be, as it seems to us, that they were at all events not so, by the *Bank's consent*. An expression, however, attributed to the Chief Justice of the Court, in the last case, was much insisted on. The assignees had endeavoured to bring it within that of *Nelson v. the London Assurance Company* (12), and the Judge commenting on the distinction between the two, puts it on the absence of any stipulation in the former, restraining the transfer of the shares, without the Directors' consent. *No doubt, as between the Company itself, and the party against whom it sought to establish a lien*, the existence or absence of such a stipulation, or of the notification of it to the public was most material. But how can it effect the operation of the statute, in a case of this nature? The question was, in each of those cases, whether the Company had or not, by its own act or consent, left it in the power of the bankrupt to appear as unconditional owner to the world. In the *London Assurance Case*, it was held by the Vice Chancellor that they had, because, though the bankrupt had assigned his shares and dividend to them, (he being a member of the same Company), as security for advances to be made him, it was agreed that, *until the Directors should otherwise order*, the party's power of transfer should

remain uncontrolled. No such order had been made, and therefore the bankrupt's reputed ownership, and disposing power, *by the Company's consent and permission*, were complete in such cases, the form of the certificate was most material. But for the purposes of the Act, in question is not in any case, we apprehend, whether a transfer or lien is valid or complete, as between the claimant and bankrupt, but (as we have already pointed out) whether it can be supported, by reason of a wrongfully permitted fictitious credit, against the latter's *Assignees*. If the claimant's title be, indeed, wholly defective, he has of course no *locus standi*. But the cases show, that any equitable claim is sufficient, to call on the Court, in bankruptcy, for exercise of its jurisdiction. The sale which is ordered, is of the bankrupt's beneficial interest only, and as at present advised, we do not see why that may not be transferred, without regard to the clause in restraint of actual membership, without the Directors' approval.

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The operation of the reputed ownership clause in England has been at last restrained, by 2 & 3 Vic., c. 29. By this Act, all dealings and transactions with and by a party, afterwards becoming bankrupt, are protected, if before the *fiat*, notwithstanding the prior commission of an act of bankruptcy. On this enactment, the case of *Ex parte Smith* (13) was decided. There a policy of assurance had been assigned, several years before the bankruptcy, and the assignee omitted to give any notice to the office, until shortly before the *fiat*, and after the commission of an act of bankruptcy. The Assignees under the bankruptcy, therefore, claimed the policy, as having always been in the bankrupt's order and disposition. But the Court of Review, and afterwards the Lord Chancellor, held that the transaction was protected by the new statute. On the same ground, it would appear, *Ex parte Dobson* (14), was decided. In that case, which was a petition to the Court of Review, by a Banking Company, claiming as mortgagees of Shares in a Railway Company, the certificates were deposited with the Bank; and the bankrupt delivered to them a formal transfer, but it was in *blank* only, and therefore inoperative. Notice was given to the Railway Company before the *fiat*; and within a few days after the deposit. In *Ex parte Pooley* (15), the lien of the equitable mortgagee (who claimed by *deposit* only) was established, on the same ground; and also on the ground, that there was not sufficient evidence, of *reputed ownership* in the bankrupt. The deposit was of four shares in a Shipping Company. The bankrupt

(13) 2 M.D. & D. 219; and 6 Jur. 158. (14) 6 Jurist 917.

(15) 2 M.D. & D. 505; and 6 Jurist 515.

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carried on trade at a place several miles distant. By the deed of settlement, none but shippers of goods were eligible as shareholders, and the depositary did not answer that description. It was provided, that when any partner was desirous of withdrawing, he should signify such desire to the Clerk of the Company, and that he might then transfer his shares to any person *approved of by the Committee*. No signification of a desire to withdraw was ever made, and the bankrupt swore that he never intended to part with his shares, and they remained standing in his name; but there was no evidence of reputation, as to his ownership one way or the other. The deposit was on the 2nd of February; the act of bankruptcy was committed on the 29th May; notice of the deposit was given to the company on the 5th June; and on the 7th July the *fiat* issued. The assignees objected to the claim, that at all events the petitioner had no valid title, by reason of the clauses in the deed above cited. But the Court thought that the bankrupt's *beneficial interest*, at any rate, was assignable, and the usual order of sale of shares, at the Mortgagee's instance, was made.

The same observation presents itself, with respect to the two last cases, as we made on that of *Ex parte Vallance*, that the depositary must have been, in each instance, regarded as "true owner," within the 6 G. IV, c. 16, s. 72, or the bankrupt's *reputed* ownership, or disposition over the property, could not have come in question.

In a very late case, *Ex parte Wood*, 1843, said to be reported in 3 M.D. and D. 315 (which, however, we have not seen), the same point may be collected. The question there was, as to a Policy of Assurance, which *Wood* claimed under a deposit from the bankrupt, who was the *mortgagor*. No notice of that deposit had been given to the *mortgagee*, and no notice was ever given, either of it, or the original mortgage, to the *office*. The Court held that the second (or equitable) mortgage was invalid, against the assignees. Here, therefore, as between these parties, the depositary must have been deemed the "true" owner; and the original mortgagee the "reputed" owner. But, had the *mortgagor* become bankrupt, then (on the same principle) he would have been, as between himself and his immediate mortgagee, the reputed owner; the original mortgagee would have been, within the meaning of the Act, the *true* owner; and by reason of the latter's consent to the assured's appearing as owner, (neither mortgagee having notice,) the *mortgagor's* assignees would successfully have claimed the policy, as in the latter's order and disposition.

We have entered thus fully into the question, on which the Court disposes of the case, because of its importance to the mercantile community, by whom it would appear to be not perfectly understood. It is thought expedient by us, to abstain from determining the equally important question, which was raised, as to the construction of the 39th section,—or that as to the jurisdiction of this Court, in bankruptcy, summarily to order compliance with its provisions,—until their decision respectively shall become distinctly necessary.

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Ex parte GIBB. (1)

Oct. 27.

Stephen C.J.
Dickinson J.
and
a'Beckett J.

Court of Vice-Admiralty—Jurisdiction—Suit by Executor—13 Ric. II, st., 1, c. 5.

An executor is necessarily authorised to adopt the same remedies in the Court of Vice-Admiralty which the testator would have been at liberty to resort to, if alive, notwithstanding the Statute 13 Ric. II, st. 1, c. 5 (*per Stephen, C. J., and a'Beckett, J., Dickinson, J., dissente*).

THIS was a rule *nisi* obtained by the owners of the ship *Urgent*, calling upon one *John Thompson* to show cause why he should not be restrained from proceeding in a suit instituted by him in the Court of Vice-Admiralty against the above-named ship, as the executor of one *Clark*, formerly chief officer of that vessel.

Windeyer and *Lowe*, for the applicant. By the statute of Richard II the Courts of Admiralty are prohibited from interfering in respect to matters occurring on the land and coming properly within the cognizance of the Common Law Courts.

Michie, contra.

THE COURT (by majority) held that the executor standing possessed of all the rights appertaining to the testator was necessarily authorised to adopt the same remedies in the Court of Vice-Admiralty which the latter would have been at liberty to resort to if alive.

Dickinson, J., was of opinion that the only jurisdiction possessed by the Court of Vice-Admiralty, and the Admiralty Courts generally, in cases of this description, was in matters where proceedings were instituted to recover wages for services actually performed, and not where a contract or other similar matter was involved.

Rule discharged.

GREENWOOD v. RYAN. (1)

1846.

April 20.

False imprisonment—Warrant “to arrest a man who calls himself Clark”—Imposition of hands—Evidence of identification—Statutory defence of arresting Constable—24 Geo. II, c. 44, secs. 1, 6, and 8—21 Jac. I, c. 12.

Stephen C.J.
Dickinson J.
and
a’Beckett J.

Arrest of plaintiff by defendant under a warrant “to arrest a man who calls himself Clark.” The plaintiff was never identified as such, and after several remands was discharged.

Held, that the warrant was good.

There may be an arrest without imposition of hands provided there be a constraint on a person’s will. Under the above warrant the defendant could only arrest a person, who could be identified as having “called himself Clark.”

By sec. 6 of 24 Geo. II, c. 44, when the officer has obeyed a warrant, for issuing which the justice is or may be liable, a copy of the warrant must be demanded by the plaintiff, and the justice joined in the action; but, by sec. 8, when the officer, with intent to obey a warrant properly issued, acts in a manner not authorised thereby, he must be sued within six calendar months.

The defendant, by noting the statute 21 Jac. I, c. 12, at the foot of his plea was probably entitled to give in evidence any matter of defence, which he had either by common law, or by that enactment, or by any subsequent statute.

Although the offence with which the plaintiff was charged amounted to larceny within the statute, 7 and 8 Geo. IV, c. 20, yet the defendant, by acting in supposed obedience to the warrant, is not entitled to the benefit of notice under that statute.

NEW trial motion in an action of trespass for false imprisonment, in which a verdict had been returned for the defendant. The facts appear in the judgment.

Windeyer and *Michie*, in support of the motion.

The *Attorney-General* and *Solicitor-General*, *contra*.

Cur. adv. vult.

The judgment of the Court was delivered by—

DICKINSON, J. This was an action of trespass, for false imprisonment, tried before me on the 24th May, 1845. The defendant pleaded the general issue, and noted at the foot of that plea the statute 21 Jac. I, c. 12.

The evidence at the trial was as follows, viz. :—Mr. *Gilbert Elliott*, the Police Magistrate at Parramatta, issued a warrant directing the

(1) *The Sydney Morning Herald*, Jan. 30, Feb. 3, and April 22, 1846.

1846. defendant to arrest "a person calling himself *Clark*, and whose person
 GREENWOOD can be identified," and delivered this warrant to the defendant, the
 v. Chief Constable for the Parramatta Police District, to be executed.
 RYAN. This warrant was endorsed by Mr. *Stirling*, a Police Magistrate for the
 Dickinson J. Sydney district: after which the defendant, with *Ross* and *Dunn*,
 policemen, went to the plaintiff's residence at the Glebe, in the Sydney
 district, at 12 o'clock on the night of the 25th February, 1845. They
 communicated with the plaintiff, who then left his house, and according
 to the evidence of one of the witnesses went *voluntarily* with the
 officers into Sydney.

The plaintiff and defendant were walking together along George-street, Sydney, at 1 a.m., on the morning of the 26th February: neither the defendant's hands nor handcuffs were on the plaintiff. At this time the defendant called on *Goebert* and *Burke*, two policemen, to accompany him and the plaintiff to the Club; the plaintiff during this time requesting and insisting that he should be put in the watch-house, which the defendant declined to do, saying "he should not like to confine an innocent man." They went to the Club in the expectation of finding Mr. *Bolton* there, and failing in that object, they all went to his residence in Jamieson-street. On their arrival there the defendant went into the house, leaving the others in the street: shortly after which they were called in, and thereupon *Bolton*, on seeing the plaintiff, said, "that's the man, I am convinced—in the daytime we shall see better." *Bolton* also said *something to this effect* (to use the witness *Goebert's* language) that the plaintiff "was the man who received his wool, and called himself *Clark*." The plaintiff made no assent or dissent to this assertion. *Burke* and *Goebert* then by order of the defendant, handcuffed the plaintiff, and took him to a receiving-house in Sydney, where he was received by *Griffiths*, the sergeant in charge, from *Burke* and *Goebert*, at a quarter before 2, on the morning of the 26th February, on a charge of receiving wool under false pretences. This witness stated, that he heard in conversation amongst these persons that the plaintiff had been taken out of his bed in Chippendale. The plaintiff was taken on the same morning, in charge of the defendant, on board of the Parramatta steamer, and was received at the Parramatta watch-house by the lockup-keeper at Parramatta from the defendant, at 11 o'clock a.m. that morning. From this place the plaintiff was removed several times to the Parramatta gaol for examination by the magistrate, and on these occasions (till the last, when he was discharged), was remanded back from the gaol to the watch-house.

The plaintiff was placed at the bar in the Parramatta Police Office several times; on the first of which occasions, viz., on the 26th February, *Bolton* was examined but not cross-examined by the plaintiff. The deposition of *Bolton* was given in evidence at the trial, which contained nothing that was material to the matter in issue.

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A witness, *Michael Burn*, deposed: That he apprehended one *Mason* sometime before the grievance complained of, and that when that person was examined at Parramatta he saw the plaintiff whispering about amongst his friends, and that he gave information to the defendant about plaintiff. On some of the occasions when the plaintiff was examined at Parramatta, *Mason* was put to the bar along with him. Sydney and Parramatta were proved to be in the colony where the venue is laid.

The Attorney-General urged to the jury for the defendant, that he was entitled to their verdict: as, first, there had been no arrest at the Glebe, inasmuch as the plaintiff went voluntarily with the defendant. He cited *Arrowsmith v. Le Mesurier* (2). Second, that there was evidence that the plaintiff had been identified; thirdly, that no arrest took place, till such identification was effected; fourthly, that the plaintiff had not proved a demand of the warrant under 24 Geo. II, c. 44, s. 1.

In summing up I told the jury that imposition of hands was not necessary to constitute an arrest if the will of the party was constrained; and the defendant could only be justified in arresting under the warrant the person therein mentioned, viz., *a man who could be identified as calling himself Clarke*. I told the jury that upon my view of the case it was unnecessary for me to tell them whether or not the warrant was valid; and the plaintiff was not obliged to prove a demand of the warrant, as the statute, 24 Geo. II, c. 44, sec. 6, was not noted at the foot of the plea.

The jury returned a verdict for the defendant. A new trial was moved on the ground that this verdict was against law, evidence, and my direction; and also because I had not directed the jury that the warrant was void in law.

We have reviewed the circumstances of this case as they appeared in evidence, and have examined the authorities cited, and also a few others; and have considered the elaborate arguments urged by the learned counsel, on either side, at the argument before us in Banco.

1846. We are of opinion, first, that the warrant is good. It is virtually to
 GREENWOOD arrest "a man who calls himself Clarke." A warrant to "arrest A.B."
 v. is in fact this, viz., "arrest a man who can be identified as a man called
 RYAN. by others and calling himself A.B." It is laid down by Lord Hale, in
 Dickinson J. 2 P.C. 114, "that if the name be unknown, you may give the best descrip-
 tion you can." And it is reasonable that delinquents shall not escape
 apprehension, merely because their names are not known. In 3 Bur-
 rows (3), it is asserted, at p. 1756, by Mr. Grey, and not denied by
 Dunning, at p. 1761, that a *description* is equivalent to the *naming* of
 the person, who must, however, be described so that an officer do not
 arrest an innocent person. If a man whose name is A.B. calls himself
 C.D., though he ought not to be named in the warrant C.D. (as that is
 not his name and does not describe him, *Morgans v. Bridges* (4), yet we
 see no objection to his being described in the warrant as a person *calling*
himself C.D. It appears to us that there is a clear distinction between
 the warrant *naming* him C.D. and describing him as a man *calling him-*
self C.D.

Secondly.—We think there was clear evidence of an arrest by
 imposition of hands, as disclosed by the testimony of the witnesses
Burke and *Goebert*. And we think, also, that provided there be a con-
 straint upon a person's will, so great as to induce him to submit, there
 may be an arrest without imposition of hands. *Pocock v. Moore* (5);
Chinn v. Morris (6); *Simpson v. Hull* (7). But in this case the
 plaintiff not only had his will constrained at the Glebe (which was a
 fact solely determinable by the jury), but he was actually handcuffed
 in Sydney by order of the defendant.

Thirdly.—We think that there was no evidence that the plaintiff
 was a man who called himself *Clark*, nor that he was identified as such.
 The only evidence tending towards it was, first, the exclamation of
Bolton, viz.: "That is the man, I am convinced: in the day time we
 shall see better"; and secondly, something else which he said *to the*
effect, that the plaintiff was the man who received his wool and called
 himself *Clark*. Now, though these sayings were uttered in plaintiff's
 presence, and he made no dissent, yet the witness said also that he
 made some reply or remark not an assent; and, therefore, we think
 that they afford no evidence that the defendant admitted that he had
 received the wool, or called himself *Clark*. For with regard to the
 first of these portions of evidence, it asserts nothing that could call

(3) *Money v. Leach*. (4) 1 B. & Ald. 647. (5) Ry. & M. 321.
 (6) 2 C and P. 361. (7) 1 Esp. 431.

for contradiction from any person; and as to the second evidence *to the effect*, we think it too indefinite for a jury on such a point to act upon. There was, moreover, nothing to show that the plaintiff was aware that there was a warrant against a person calling himself *Clark*, or that he was asserted to be that individual. The only witness who spoke to having known the plaintiff before the occurrences detailed was *Michael Burn*, and he said he knew the plaintiff by the name of *Greenwood*.

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Fourthly.—We think that the defendant could only arrest such a person as was described in the warrant, *viz.* : a person who could be identified (*i.e.*, identified on oath) as a man calling himself *Clark*. If the plaintiff did not answer that description, the defendant had no right to arrest him, even if he had been charged with the offence specified, and was the party really intended. *Hoye v. Bush* (8).

Fifthly.—On the case as it now stands (*i.e.*, it not having been proved that the defendant *obeyed the warrant*, or, in other words, apprehended a person *calling himself Clark*), we are of opinion that it was not necessary for the plaintiff at the trial to prove a demand of a copy of the warrant.

The case last cited is a distinct authority upon this point. As much stress was laid upon this point at the trial, and on the argument, and as it may again occur, and as there appears to be some discrepancy between the 6th and 8th sections of the statute 24 Geo. II, c. 44, we will point out the distinction between them shown by the cases. We conceive it to be this: Where the officer has done what the warrant commands, but the magistrate was wrong in issuing it, then the plaintiff must by section 6 demand a copy of the warrant, and join the justice in the action: for the officer is excused, and the justice is liable under those circumstances; and, if such warrant is not demanded, the plaintiff must fail in his action. *Money v. Leach*, (9); *Miller v. Green* (10); *Price v. Messenger* (11); *Crozier v. Cundy* (12); *Bell v. Oakley* (13); *Sly v. Stevenson* (14); *Kay v. Green* (15); *Slurch v. Clarke* (16); *Hoye v. Bush* (17). If the officer has done a wrong which he was not commanded by the warrant to do, then if he acted *bonâ fide*, and with an honest opinion that he was obeying the warrant,

(8) 1 M. & G., 775. (9) 3 Barr., 1742; 1 Wm. Bl. 555; 19 St. Tr., 1001.
(10) 5 East, 233. (11) 2 Bos. & Pul., 158. (12) 6 B. & C., 232. (13) 2 M. & S., 259. (14) 2 C. & P., 464. (15) 7 Bush, 312. (16) 4 B. & Ad., 113.
(17) 1 M. & G., 775.

1846. he is entitled to the protection of section 8, which enacts that the
 GREENWOOD action must be commenced against him within six months. *Parton v.*
 v. *Williams* (18); *Smith v. Wiltshire* (19). The distinction may be more
 RYAN. shortly expressed thus. A copy of the warrant must by section 6 be
 Dickinson J. demanded, where the officer has obeyed a warrant for issuing which the
 justice is or may be liable—but when with intent to obey a warrant
 properly issued he acts in a manner not authorised thereby, he must by
 section 8 be sued within six calendar months.

As we are of opinion that the plaintiff need not have demanded a copy of the warrant, it is unnecessary for us to determine whether I was correct in saying that the defendant could not insist upon it at the trial, on the ground I assigned, viz., that the statute 24 Geo. II, c. 44, sec. 6, was not noted at the foot of the plea. We are, however, inclined to think that the defendant, by having noted the statute 12 Jac. I at the foot of the general issue, was entitled to give in evidence any matter of defence, which he had either by common law, by that enactment, or any subsequent statute. But we think it may nevertheless be a prudent precaution in a defendant who pleads the general issue, by virtue of any statute, to refer to all other statutes which may be instrumental to his defence, so that no difficulty may arise on the peculiar wording of the rule of this Court.

It was, however, urged, on the argument by the Attorney-General, that as the defendant was charged with receiving wool under false pretences—which offence is equivalent to larceny by the statute 7 & 8 Geo. IV, c. 29—that the defendant, in apprehending the plaintiff, was acting in pursuance of that Act, and that as the plaintiff had given the defendant no notice of action, the defendant was entitled to retain his verdict.

But we are clearly of opinion that the defendant, in arresting the plaintiff under the circumstances disclosed on the trial, was not acting in pursuance of the last named statute, but in what he conceived to be obedience to the warrant.

Being of opinion, therefore, that the evidence given at the trial showed, first, that the plaintiff was arrested; and secondly, that it was not shown that he was the person described in the warrant; and thirdly, that the defendant's acting in *supposed* obedience to the warrant, does not entitle him to the benefit of the sixth, but only to that of the eighth

section of the statute 24 Geo. II, c. 44 ; and as the action was commenced within the time limited by the last mentioned section, and as we moreover think that the Larceny Act has no application to this case, we are of opinion that there must be a new trial.

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We think that the verdict of the jury is unsatisfactory, as being founded neither on law nor evidence, and as being against the direction from the bench ; and we therefore order that the rule for the new trial be drawn up generally, so that the defendant will not in any event obtain the costs of the first trial.

New trial granted.

1846.

TULIP v. KING. (1)

Nov. 27.

Stephen C.J.
Dickinson J.
and
Therry J.

Covenant—Imprudent agreement—Implied duty—Master and servant.

Action on the case in which the plaintiff declared on an agreement under seal, whereby he agreed to proceed to Australia, and work for the defendant as a collier, and to work for no other unless by permission of the defendant, payment to be made according to the amount of work done. The plaintiff averred that the defendant was thereby under a duty to provide the plaintiff with a reasonable quantity of work for his maintenance and support, but had failed to do so.

Held, on demurrer, that there was no express or implied contract to find full employment, and consequently no duty, and that if there were a duty, not Case but Covenant was the appropriate remedy.

Demurrer to the declaration in an action on the case. The declaration and argument are fully set out in the judgment of his Honor the Chief Justice, which was delivered, after a previous expression of the opinion of the Court, on November 27.

The CHIEF JUSTICE: This was an *Action on the Case*, against the Australian Agricultural Company (sued by King as nominal defendant, under the Act of Parliament establishing the Company), for not providing the plaintiff with a reasonable quantity of employment and work as a collier.

The declaration so far as it is material for the purpose of this judgment to state it is as follows. It is alleged that by a certain indenture dated 17th July, 1841, it was covenanted and agreed, between the plaintiff of the one part, and the company of the other part, that he should proceed from England to this colony, and there place himself under the direction and control of the Company's Commissioner and agents; and should faithfully serve the said Company, and perform all the duties of a collier, as should be required by the said Commissioner, for the term of seven years from the date of the said indenture; and would obey all rules, &c. It was further agreed, that the plaintiff should not nor would during the said term absent himself from the business of the Company, without the license of the Commissioner first obtained for that purpose in writing. There were also some other stipulations. It was then alleged that, by the said indenture, in

(1) *The Sydney Morning Herald*, Feb. 7, April 24, 25, Nov. 16, 28, 1846.
Cited 2 N.S.W.L.R. 261.

consideration of the premises, the said Company covenanted and agreed to provide a passage for the said plaintiff to New South Wales, to provide a residence and garden for him there, and to allow and pay him by monthly payments for cutting and filling coal, a sum varying from one shilling and ninepence to two shillings per ton, as the Commissioner should determine, exclusive of any price that might be determined upon for driving of headings or main roads, and air roads, &c. And the Company further covenanted to allow the plaintiff certain rations, during the continuance of his service under the said agreement. The declaration proceeded to aver, that after making the said agreement the plaintiff shipped himself at London, and afterwards arrived in this colony, and entered into the service of the Company under the said agreement; and that he hath always from that time continued in their service, and complied with and fulfilled all things by him agreed to be fulfilled. Then follows this allegation: *that it became and was the duty of the said Company, during the time the plaintiff should be performing the agreement on his part, to give and provide the plaintiff a reasonable quantity of work and employment as a collier during the service of the plaintiff under the said agreement; of all which the said Company had notice. Nevertheless the plaintiff saith, that although always after the making of the said agreement, and during the time the plaintiff hath been engaged in such service as aforesaid, he hath been able and ready and willing to perform any reasonable quantity of work as a collier, which the said Company might give to or provide for the plaintiff in that behalf, of all which the Company then had notice, yet the said Company, not regarding its duty in that behalf, but intending to injure and defraud the plaintiff, did not nor would during the time he continued in the service of the said Company under the said agreement give and provide for the plaintiff such reasonable quantity of work as aforesaid; but on the contrary thereof, whilst the plaintiff was in the said service, and before the expiration of the said period of seven years, to wit, on the day and year last aforesaid, and from thence until the commencement of this suit, wholly neglected and refused to allow the plaintiff to perform such reasonable quantity of work, as he could and then might have performed, but for such wrongful conduct; and gave to and provided the plaintiff with so little work as a collier as aforesaid, that he was by such misconduct and default of the said Company, wrongfully deprived of divers great gains and profits which he otherwise could and would have made.*

To this declaration the defendant demurred, on the general ground that it shows no cause of action—that under the circumstances in the

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1846. declaration mentioned, the supposed duty of the said company did not
 TULIP arise; and that if it did not arise, no breach of it is disclosed by the
 P. declaration. The demurrer further objected, that no profert is made
 KING. of the indenture or deed of covenant set out in the declaration, neither
 Stephen C.J. is any excuse shown for not making profert thereof. Lastly, that if an
 action be maintainable in respect of the supposed cause of action, it
 must be an action of Covenant, or other action on the agreement entered
 into between the plaintiff and the company; that at all events an Action
 on the Case, in the form set out in the declaration, on the facts therein
 disclosed, is not maintainable.

This demurrer was argued before Mr. Justice *Dickinson* and myself,
 (Mr. Justice *a'Beckett* being on the point of departure for Port Phillip,) in the first term of the present year. In the vacation, we looked into the authorities cited by Mr. *Michie*, on behalf of the plaintiff. Those authorities failed to satisfy us, that he had any cause of action; and, in the Term following, with the concurrence of Mr. Justice *Therry*, we gave judgment for the defendant. I then intimated, that our reasons for that judgment would be assigned at an early period, but the incessant pressure of other business, delayed my performance of the duty. In the meantime, we had lit on a case, not mentioned at the bar, and indeed until of late not accessible to ourselves, which renders the task which I had proposed to myself quite unnecessary.

In any event we had intended to notice the one substantial objection, merely, that no duty such as that alleged by the plaintiff arises, or can be inferred, from the circumstances stated in the declaration, and that the supposed ground of action, therefore, fails. It was, as we thought, unanswerably urged by Mr. *Darvall*, that there was here no express contract to find full employment; and that the Court could not, without introducing a new term and stipulation into the agreement, imply one; that if the agreement were improvident or unreasonable, we could not make a new one for the parties; but that, if there were no contract, expressed or implied, there was then no *duty*; for that a duty to find employment, as between these parties, could not be inferred, independently of contract; and, finally, that if such a duty were a necessary inference from the contract, not *Case* but *Covenant* was the appropriate remedy. The cases of *Ogilvie v. Foley* (2), and *Schlenker v. Moxey* (3) were cited on these points. For the plaintiff, however, it was insisted that a contract was necessarily to be implied, and that a duty in the

Company arose, from the circumstances that, under the agreement, the plaintiff was to work exclusively for them, during the entire period bargained for, but was to be paid according to the quantity of work performed, of one kind only, that such a contract, if no duty arose to give him a reasonable amount of employment in that particular work, was void, that it was in restraint of trade, that it might happen, and probably would, on the bare literal terms of such a contract, that the plaintiff's services would never be put in requisition, and that so, he might not earn anything. Such a state of things, it was urged, could not have been in the contemplation of either party. *Polhier on Contracts*, vol. 2, p. 35, *Chitty on Contracts*, pages 70 and 84, and *Bacon's Abridgment*, *Covenant B*, were referred to, and the following cases were cited; *Young v. Timmins* (4); *Curry v. Edensor* (5); *Burnett v. Lynch* (6); *Corbin v. Leader* (7); *Lees v. Whitcomb* (8); *Hitchcock v. Coker* (9); *Earl of Shrewsbury v. Gould* (10); *Payne v. Ives* (11); *Boorman v. Brown* (12); and *Jones v. Hill* (13).

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It appeared to us, as I have already observed, that nothing in these cases, (some of which on examination we confess we thought did not apply,) or in the very ingenious argument raised on them, established the position contended for. But the recent case of *Williamson v. Taylor* (14), being the one before alluded to, appears to us distinctly to decide the question. That was a case of a collier's contract, and its stipulations were, in substance, identical with those here. The payment specified, was per score of coals, that is, according to the quantity of work done in the pit. There was no provision, how often or how long the pit should continue working. But it was stipulated, that during all the time it was laid off work, the plaintiff should continue the defendant's servant, and be employed as the latter might think fit. It was insisted for the plaintiff, that a contract arose by necessary implication from such an agreement, on the part of the defendant, to give the plaintiff a reasonable amount of employment. If not, it was said, the pit might be kept out of work altogether, and the plaintiff would be left without any remuneration at all. This action was accordingly in *Assumpsit*, alleging the existence of such a contract. But the Court held, after taking time to consider, that they could only judge of the agreement by its terms; and that nothing in them warranted the implication contended for. The only distinction between that case and the present is,

(4) 1 C. & J. 331; 1 Tyr. 15. (5) 3 T.R. 524. (6) 5 B. & C. 589.
 (7) 10 Bing. 275. (8) 5 Bing. 35. (9) 6 Ad. & EL. 438. (10) 2 B. & Ald. 487.
 (11) D. & R. 664. (12) 3 Q.B. 511. (13) 7 Taunt 391. (14) 5 Q.B., 175.

1846. that there the claim was relied on as *parcel of the contract*; whereas
TULIP here, it is rested on a supposed *duty*, arising out of the contract. The
v. argument is, therefore, that although the matter omitted cannot be
KING. regarded as part of the contract, the Company ought nevertheless to be
Stephen C.J. held liable, as if in fact it were part of the contract. Such a distinction
appears clearly to us to be one without a difference; and if it could be
sustained, the conclusion would follow, that a plaintiff can give himself
a right, to which otherwise he would have no claim, by merely changing
the form of action in which he sues.

Demurrer upheld.

REGINA v. MURRAY. (1)

1846.

Habeas Corpus—Prisoner detained under illegal sentence of a Foreign Court—Jurisdiction. /

April 8 & 21.

Stephen C.J.
Dickinson J.
and
a'Beckett J.

The Court has jurisdiction to order the release of a prisoner confined in this country under an illegal sentence of a Foreign Court.

HABEAS CORPUS, issued by the *Chief Justice*, directing the Principal Superintendent of Convicts to bring up the body of the abovenamed defendant, who was detained in custody as a convict prisoner of the Crown.

It appeared that the defendant had been convicted at the Carlow Assizes, in the year 1838, for bigamy, and had been transported to this colony, where he arrived during the same year, and in the indent which was produced it appeared that in the column in which the sentence was described, the word "life" was inserted. The writ had been issued on the application of Mr. *Nichols*, on the ground that at the time of *Murray's* trial and conviction, the only punishment that could legally be inflicted was under the Imperial Act of Parliament, 10 Geo. IV, cap. 34, sec. 26, which only authorised a *sentence of transportation for seven years, or imprisonment with or without hard labour for any period not exceeding two years.*

Windeyer moved for the prisoner's discharge. This is not a question of superiority of jurisdiction, but merely whether the conviction is legal or illegal. *Leonard Watson's* case (2).

THE CHIEF JUSTICE in delivering the decision of the Court said, that himself and his brother Judges had not the least doubt as to their possessing power to direct the prisoner's discharge, and as to their being called upon under such circumstances to adopt this course. This was in point of fact no interference with the judgment of the Court by which sentence had been passed, the real and only question being, whether the prisoner was legally or illegally in custody. It appeared by the return to the writ, out of which the Court could not travel, that the prisoner was in custody under a sentence of transportation for life

(1) *The Sydney Morning Herald*, April 9 and 22, 1846.

(2) 9 A. and E. 731.

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for the offence of bigamy. This might be a mistake of the clerk, for the offence of which the prisoner had been convicted might have been one which would authorise the passing of a sentence of transportation for life ; or, on the other hand, the sentence really passed might have been that of transportation for a shorter period. However this might be, it was sufficient for the Court to see by the return, that the only authority for detaining the prisoner in custody was an alleged sentence of transportation for life, under a conviction of a crime which, at the utmost, only warranted a transportation for seven years. Such being the case, it was clear that the prisoner was illegally detained in custody, and it was their duty as the guardians of the general liberty of the subject to direct his discharge.

Discharge ordered.

REGINA v. CUMMINGS. (1)

1846.

Criminal information—Grounds for granting—7 Geo. IV, c. 64, s. 1—9 Geo. IV, c. 83, ss. 5 and 6—Form of the rule—Affidavit in support—"Degree" of Dependent—"Settler"—Power of Attorney-General to file informations—Information not on parchment—Postponement of trial—Absence of material witness.

May 12.
July 8.
Stephen C. J.
Dickinson J.
and
Therry J.

In an application for a criminal information the Court will be guided by the principles laid down in the statute 7 Geo. IV, c. 64, sec. 1, viz., that if there be a strong presumption of guilt the person charged shall be committed to prison, and if notwithstanding evidence given in behalf of the said person, there still appear sufficient grounds for judicial inquiry, he shall be admitted to bail by the justices.

A rule *nisi* for a criminal information in the form given by *Chitty* is good, although the applicant's name is not therein stated.

The word "settler" is not a sufficient legal definition of the degree of a dependent, and his affidavit will therefore be excluded.

Leave to file a criminal information in the name of the Attorney-General not having been taken advantage of by the person to whom it was granted, the Attorney-General *ex officio* filed an information against the same defendant, although he had before refused to do so, calling on him to answer a charge of forgery, and although on a prosecution before the Magistrates defendant was not committed for trial or held to bail, but had been twice discharged by the Bench. The information was not filed in term or during criminal sittings.

Held that by sec. 5 of 9 Geo. IV, c. 83, the Attorney-General was merely in lieu of a grand jury, until its establishment, and none of the powers and liabilities of the latter had been conferred or imposed upon him. Informations were therefore to be filed by him as in cases of misdemeanor. The above *ex-officio* information was therefore good.

It is no objection to an information that it is not on parchment, such not being in use in the colony for this purpose. The Court will grant a postponement of the trial where a material witness for the defence cannot be obtained from a distance in time, although the principal witness for the prosecution is detained at great inconvenience, and the grant of a postponement cannot be limited by the condition that the defendant shall consent to the evidence of the latter witness being taken *de bene esse*.

THIS was an application by *W. H. Mackenzie*, under sec. 6 of 9 Geo. IV, cap. 83, for a rule *nisi*, calling upon *W. Cummings*, of Hartley, to show cause why a criminal information for forgery should not be filed against him in the name of the Attorney-General.

April 21.

It appeared from the affidavits that *Mackenzie* had sold to *Cummings* a number of cattle, payment to be by four bills, which were prepared by *Mackenzie*, and which were to be signed by one *Jeremiah Grant*.

(1) *The Sydney Morning Herald*, April 22, May, 9, 11, and 13; July, 8 and 9, 1846.

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The prosecutor sent one *M'Innes* with the defendant to procure *Grant's* signature and deliver the cattle thereafter. The bills were returned to the prosecutor's solicitor signed with *Grant's* name, but were dishonored by the latter, who denied having executed them. Proceedings were commenced by the prosecutor before the Sydney Police Bench, but the first application (*M'Innes* being absent) was dismissed, and also the second, without any reason being assigned. The Attorney-General also refused to interfere after the dismissal of the case in the Police Court. The affidavits of the prosecutor, *Grant*, *M'Innes*, and the solicitor of the prosecutor were filed in support. On the motion of Mr. *Michie* a rule *nisi* was granted.

May 8. *Michie*, for the prosecutor, moved to make the rule absolute.

Windeyer, for the defendant, raised the objection that it did not appear on the face of the rule who it was, that sought the permission of the Court to file a criminal information against the defendant. The insertion of the applicant's name was necessary to show to whom the defendant must look for costs.

Michie, contra. The matter of the applicant's name is of little moment, as he is by statute required to enter into recognizances. The form used was that prescribed by *Chitty*.

The COURT overruled the objection.

May 9. *Windeyer* objected to the use of the affidavit of *M'Innes* on the ground that he was therein described as a "settler," which was a definition unknown to law, and that there was no legal definition therein as to his degree.

The COURT sustained the objection.

Windeyer read the affidavit of the defendant, denying the charge alleged, and contended that this proceeding was with the object of harassing the defendant, who had a suit against the prosecutor pending in equity.

Cur. adv. vult.

May 12. The judgment of the Court was delivered by—

THE CHIEF JUSTICE. The affidavit of *Alexander M'Innes* although it had been read in support of the motion for the rule *nisi*, and had been heard by the Judges by whom the rule had been granted, had been since shut out for informality, so that Mr. Justice *Dickinson*, who was absent at the time, had not read it at all. This affidavit, therefore, had been

completely excluded from the consideration of the Court, and the decision would be grounded solely upon the affidavits of Messrs. *William Henry Mackenzie, Jeremiah Grant, and Gilbert Wright*. The judgment of the Court would be pronounced upon the principles laid down in statute 7 Geo. IV, c. 64, the first section of which enacted, "That when any person shall be taken on a charge of felony before a justice of the peace, and the charge shall be supported by positive and credible evidence of the fact, or by such evidence as, if not explained or contradicted, shall, in the opinion of the justice, raise a strong presumption of the guilt of the person charged, such person shall be committed to prison." The same section went on to enact, "that if, notwithstanding the evidence adduced on the behalf of a person thus charged, there should appear to be sufficient grounds for judicial inquiry, the person charged shall be admitted to bail." Applying these principles to the present case, the Judges are unanimously of opinion that although the affidavits of Messrs. *Mackenzie, Grant, and Wright*, excluding altogether that of *M'Innes*, did not raise a sufficiently strong presumption of guilt to warrant a committal to prison under the terms of the first part of the above section; there were, nevertheless, sufficient grounds shown for a judicial inquiry. Leave would, therefore, be granted for such inquiry by criminal information. His Honor added, however, that the Judges purposely abstained from expressing any opinion as to the grounds upon which they had arrived at this conclusion, inasmuch as such a statement might prejudice the defendant on his trial and all which it was necessary for them to determine was simply that there were sufficient reasons to warrant a further investigation.

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An information having been filed since the above judgment by the Attorney-General, *ex officio*, against the defendant,—on July 7 and 8

Windeyer, for the defendant, and his sureties moved, on notice served on the Attorney-General, calling on the latter to show cause, why the recognizances entered into by them for the appearance of *William Cummings*, to answer a charge of forgery, should not be rescinded, and all proceedings stayed upon the following grounds, viz:—that the information had been filed by the Attorney-General of his own motion, without any rule or order of the Court; that the said information was not filed in term time, or during any criminal sittings of the Court; that the defendant had not been committed for trial or held to bail previously by any tribunal; but that, on the contrary, he had been twice brought before the Police Bench on this charge, and had on each occasion been discharged; that the information had been filed without

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any legal evidence being given to the Attorney-General in respect of the matters thereof; that the Attorney-General had no right or power, either at common law or by virtue of any statute, to exhibit an *ex officio* information for felony; that the information had been filed by the Attorney-General *ex officio*, and not on oath upon evidence adduced before him in his character of a substitute in the colony for a grand jury; and that leave having been given to one *W. H. Mackenzie* to file an information, in the name of the Attorney-General, against the defendant, for the same offence as that with which the latter stood charged by the information at present on the file, such proceeding was still pending, and the defendant was liable to be tried in consequence of the permission granted to *Mackenzie*.

He contended that the Attorney-General had been put by the New South Wales Act merely in the place of a grand jury, and would be required in all cases to proceed as a grand jury. He also objected to the information on the ground that it was not on parchment.

July 8.

The CHIEF JUSTICE said, that it would not be necessary to call upon the *Attorney-General*, for the Court had already had an opportunity of considering the point, and of looking into the authorities, and had received a particular impression respecting it, subject to anything which might be afterwards urged by the defendant's counsel. This impression was not changed by anything which had been said by Mr. *Windeyer*, and indeed the point appeared almost too plain for argument. To determine this matter, they would have to consider what a criminal information really was, and what was the power of the Attorney-General. By reference to the statute which had been already alluded to, it would be seen that the Imperial Legislature, instead of conferring upon the Attorney-General any of the powers of a grand jury, or of imposing upon him any of the duties of such a body, had expressly declared that until their establishment in the colony all offences should be prosecuted by informations in his name. The Attorney-General was therefore placed in lieu of a grand jury, and he was not to make presentments in the way that a grand jury would have done, but to file informations in the ordinary manner as in cases of misdemeanor. An information then, as had been stated by Lord *Mansfield* in the case of the *King v. Walker* was a mere suggestion by the Crown on record, that a certain offence had been committed; and it was open to the Crown, acting through the medium of its law officers, to make such suggestions whenever it thought fit. It was clear that by virtue of the Act of Parliament all offences were to be prosecuted by information in this

manner, and there was nothing in the present case to take it out of the ordinary course; for, although permission had been given by the Court to *Mackenzie* to file an information of this kind in the name of the Attorney-General, this had not been done, and there was nothing to prevent the Crown from coming in and prosecuting the defendant if it thought fit. It was the simple duty of the Judges to interpret the law as they found it, and if this state of things was judged improper, the remedy lay in the hands of the Legislature.

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DICKINSON, J., expressed his concurrence in what had fallen from the Chief Justice, adding that all had been urged by the learned counsel for the defendant which could have been urged on such a question.

With reference to the objection as to the information not being on parchment, their Honors were of opinion that it was sufficiently answered by the long practice of the Court in this respect.

Application dismissed.

Before the *Chief Justice* and Mr. Justice *Dickinson*.

Windeyer moved for a postponement of the trial, on the affidavits of the defendant and his attorney, on the ground that one *Byrnes* who resided in the Lachlan District, above 200 miles from Sydney, was a material and necessary witness for the defendant, as he could disprove the assertions of *McInnes*, and that the defendant was not aware that the case would be tried during the present sittings until June 1.

The *Attorney-General* opposed the application on the ground that the defendant had had sufficient notice, and that the witness *McInnes* was anxious to return to New Zealand as he was suffering great pecuniary loss by his absence.

The COURT suggested that the defendant should consent to the evidence of *McInnes* being taken *de bene esse*.

Windeyer objected to the attachment of this condition to the postponement. *McInnes* had given evidence before a Bench of Magistrates and the case had been dismissed. The defendant had a right to his examination before a jury.

The COURT granted the application unconditionally, being of opinion that there was sufficient upon the affidavits to show that the witness alluded to was really necessary for the defence; and the defendant had been guilty of no *laches* in not having already taken measures to seek

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him out, for as the space of time which had been allowed him appeared to be insufficient, there was every probability that he might have regarded the expense with which such a search would be attended, as a fruitless one. It was very natural also, that under such circumstances as these the defendant should be desirous of consulting his attorney before he took any further steps, and they (their Honors) were not prepared to say that if they were to impose such a condition as that alluded to, after the case had been already heard and dismissed by a Bench of Magistrates, they should not, by depriving the jury of an opportunity of judging of the witness's demeanour, be acting unjustly.

Application granted.

[EXCHEQUER JURISDICTION.]

WINDEYER v. RIDDELL and FLOOD. (1)

1846.

Exchequer Jurisdiction of Supreme Court—Accountant to the Crown—Right of Crown to change of venue—Quit rents—Internal revenue of Crown—1 & 2 Vict., c. 2, sec. 2—Right of Crown officer to distrain for arrears of quit rents—Time of sale of distress—51 Hen. III, c. 4—Trespasser ab initio—Right of Crown to trial at Bar.

May 4,
Oct. 26,
and Feb. 3,
1847.

Stephen C.J.
Dickinson J.
and
Therry J.

An action against the Colonial Treasurer and a collector of quit rents for trespass, by breaking into the plaintiff's house, and for the seizure and sale of plaintiff's goods for arrears of quit rents, is one in which the Crown is interested, and an application for its removal into the Exchequer Jurisdiction of the Court must be granted.

The Court has no means of accomplishing this, but by directing that the action henceforth shall be, and be deemed and taken to be, specifically in that jurisdiction.

The right of the Crown to have the *venue* laid wherever it pleases does not extend to all actions which are not *real*, but only to such as are *transitory*, and therefore not to the present case which, although a *personal* action, is in its nature *local*.

The prerogative right of the Crown to a trial at Bar is in force here, notwithstanding the absence of the writ of *nisi prius*.

On cross-demurrers by the plaintiff, and the defendants (severally), to the pleas and replications respectively, the following points were decided by the Court. The property in the quit rents, being part of the ordinary internal revenue of the Colony, was rightly laid in the Queen, even assuming that the surplus revenues of the Colony had been surrendered to Parliament by the Crown by the Statute 1 & 2 Vic., c. 2, sec. 2.

The Collector of Internal Revenue, although not specifically authorised to distrain for the recovery of such rents, is recognised as a legal officer by several Colonial statutes, and by 3 Will. IV, No. 8, sec. 8, is required to perform a specific duty, and a distress being one means for the recovery of the rents, he is therefore entitled to distrain.

The officer of the Crown having distrained, is bound to remove the goods at once, and failing to do so becomes a trespasser *ab initio*, for he entered under the general authority of the law.

The goods taken should not have been sold till after the expiration of fifteen days from their seizure, as laid down by 51 Hen. III, c. 4.

THIS was an action against the Colonial Treasurer and the Collector of Quit Rents for the county of Gloucester, by which the plaintiff sought to recover damages for an alleged trespass, in the seizure and sale of his property for arrears of quit rent. The Attorney-General moved on

(1) *The Sydney Morning Herald*, May 2 and 5, Nov. 9 and 12, 1846; Feb. 4, 1847.

1846. notice, representing the Crown, to change the *venue* from Maitland to
 WINDEYER Sydney, and to have the record removed into the Exchequer Jurisdiction
 v. of the Supreme Court.
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The *Attorney-General*, the *Solicitor-General*, and *Fisher* for the Crown. The revenue of the Crown is concerned and consequently the action should be defended by the Crown officers. The Crown has a right to a change of *venue* in all actions not purely local.

Lowe, for the plaintiff. This is the only Court open to the plaintiff, and the application if granted will prejudge the case in regard to the question of the defendant's authority, as the bailiff of the Queen. The plaintiff will also be deprived of Costs however just his action. The Crown has no right to change the *venue* except in cases of a transitory nature.

Cur adv. vult.

May 4. The judgment of the Court was delivered by—

THE CHIEF JUSTICE. We have conferred together on the application made in this action, by the *Attorney-General*, on behalf of the Crown, for its removal into the Exchequer jurisdiction of the Court, and for the change of the *venue* from Maitland to Sydney; and after consideration of the arguments, and the authorities cited, we are of opinion that the first portion of this motion, must be granted, and the second refused.

The action is in trespass; 1st, for breaking and entering the plaintiff's dwelling house; in the parish of Stockton, in the county of Gloucester; and, secondly, for taking and carrying away his goods. As to the first count, therefore, this is a *local action*. But the *Attorney-General* brings before us affidavits, by the Crown Solicitor, and one of the defendants, Mr. C. D. Riddell, (describing himself as Treasurer in this colony, and Collector of Internal Revenue,) setting forth that the action is brought in respect of a distress made for arrears of quit-rent, due by the plaintiff to Her Majesty, which arrears having been by that means realised, have been paid into the Colonial Treasury, for the use of Her Majesty; and the *Attorney-General*, contends, that this being a *personal action*, in which the Queen is thus shown to be (as he maintains) directly or indirectly interested, the Crown has a right to have a *venue* laid in whatever county it pleases. He admitted, that in the particular case of an information of intrusion, the right does not exist; but he contended, that this exception arose merely from the circumstance, that the Sheriff of the county had, as in an action of ejectment, to deliver possession of the lands. In all other cases, not being *actions real*, the *Attorney-General*

insisted that the Crown had the right in question. We are of opinion, however, that the right exists in *transitory* actions only, and not in any action which (as here) is in its nature local. For this, it appears to us that the *Attorney-General v. Lord Churchill* (2) is a distinct authority. The Court of Exchequer there, admitting that "the King may lay his action in what county he pleases, in *any personal action*," held that the word personal was used, not as opposed to *real*, but in the sense of *transitory*; and the prerogative of the Crown, in actions usually termed *local*, was denied. We may add, that the authorities relied on for the right claimed, so far as our research has extended, relate apparently to actions and proceedings in which the Crown prosecutes; and not to cases in which, as in the present instance, it is (or seeks to be) defendant.

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I come next to the question of the removal of the action, as the motion terms it, into our Exchequer jurisdiction. As to a *removal*, in the literal sense, we feel the same difficulty that we did in the outset. The Court has, by the Statute sanctioning its creation, all the jurisdiction of the several Courts at Westminster; and, therefore, that of the Court of Exchequer. But the Court is, nevertheless, in its several jurisdictions, one Court only. Consequently, whether this action properly belongs to (what may be called) the Queen's Bench side, or to the *Exchequer* side of the Supreme Court, it has in fact been commenced in the proper and only competent tribunal. If specially indicated to belong to the latter jurisdiction, the process and pleading would have been in the same form as they are in now; and whether we allow the Crown or not to the benefit of the prerogative contended for, the action will be contended in the same offices, and under charge of the same officers, as at present. If the Crown, however, be entitled to that benefit, (in other words, if the Crown would, in England, in the case of a similar action there, instituted in the Queen's Bench or Common Pleas, be entitled to have the action removed into the Court of Exchequer,) we hold it to be clearly our duty to permit the Crown to enjoy the same prerogative equally in this Court, whatever the form or mode may be, by which the concession is to be indicated. We are asked, substantially, to place this action on the *Exchequer side* of the Supreme Court. There is no mode of accomplishing this, that we are aware of but by directing that henceforth it shall be, and be deemed and taken to be, specifically in this jurisdiction. And in effect, though not in terms, this is what the motion seeks. What may be the advantages or disadvantage, to one side or the other, resulting from such a direction,

(2) 8 M. and W. 171; 9 Dowl. 772.

1846. we need not now inquire. They will be the same that would result from the actual removal of a cause, similarly circumstanced, in England, into the separate Exchequer jurisdiction there. An *actual* removal, the circumstances of this Court being considered, is impracticable; but the effect incidental to such a removal, if the present be a fit case for exercising the power we are bound not to withhold.

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Is the present, then, a case of that description? We have already intimated our opinion that it is. If this were an action pending in the Court of Queen's Bench, we entertain not the slightest doubt that it would at once, and as a matter of course, be removed on motion into the Exchequer. In the case of *Cawthorne v. Campbell and others*, cited in 1 *Anstr.* 205, in which that was the application, Lord Chief Baron *Eyre* states (amongst others) the two following, as well known grounds for such a motion:—*First*, where any matter properly cognizable on the revenue side of the Exchequer, is drawn into question in another Court; *Secondly*, where the matter of suit, in another Court, touches the profit of the Crown. In cases of the former class (of which one reported in 8 M. and W. 163 (3) was cited by Mr. *Lowe* from vol. 20 of the *Law Journal*), the institution of proceedings in another Court, may even under certain circumstances amount to a contempt. But it is in the second class of cases, that the present is more properly to be included; and of these it will be sufficient to mention four, taken from Chief Baron *Eyre's* judgment. The first is *Lamb v. Gunman*. There, the dispute was between private parties only, as to a claim of prisage on wine. But because the King had a *reversionary interest* in that prisage, the cause was removed into the Exchequer. The second is the case of *Pennington*, a Collector of Customs, against whom an action was brought to recover back money paid him for duties on glass. It appeared that *Pennington* had accounted to the Crown for that money, so that "he never could have drawn it back again," observes the Chief Baron, "even if there had been a recovery against him. But it was *incidentally* a question in the cause, whether the duties were or not to be paid. *That was a question which concerned the King, and therefore the cause was removed.*" The two other cases are those mentioned in p. 214, of trover for a ship, and trespass for seizing goods on board her. That seizure being for non-payment of duties, and therefore one of the questions being whether they were payable, both actions were removed into the Exchequer. "If the duties were payable," says the Chief Baron, "then it might follow that the party might have a right to enter the ship, and

look for the goods." It may be collected from this, that the question was not in that case in reality, *whether the duties were payable*; but that dispute was, *whether the seizure was, under the circumstances, justifiable*. So, in the principal case; before Lord Chief Baron *McDonald*. The action was for assault and false imprisonment; but it being sworn by the defendant, that the occurrences arose solely out of the execution of his duty, as an officer of revenue, the cause was removed. The defendant, it appeared, had seized the plaintiff's ship, on suspicion of smuggling. It did not appear, however, that his appointment was admitted, or his authority to seize recognized; and consequently, the *smuggling* was not the only question (4).

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Now to apply those cases to the present. It was argued for the plaintiff, that the Crown could not be interested, nor its profit be touched or brought into question in this action, because (it was suggested) it might be admitted that the quit-rent in question, or some quit-rent, was due, and yet a material question, if not the only one, might be, whether the defendants *had any lawful authority for what they did*; or *could collect rents for Her Majesty*:—and so, it was urged, the Crown could not be taken to be represented by, or connected with them. But the same argument, it will be seen, in substance, might with equal force be urged against the cases quoted in this judgment. Here is an action, brought against a public accountant to the Crown, for (as he swears) a distress made for quit-rents due to Her Majesty, and by him paid into the Colonial Treasury for Her Majesty's use; and he adds, that large sums have been similarly collected, and accounted for and paid by him in respect of such rents, due from other persons. To contend, under such circumstances, that the Crown is nevertheless not directly or indirectly interested in this action, or that its profit is not in question,—especially bearing in mind the cases cited, illustrative of the meaning of those terms, appears to us to be a waste of words. The plaintiff should, at the least, having distinctly shown, that he did not mean to dispute the claim, but only the mode of enforcing it: and even then, we do not see how the cases could be avoided, as authorities are quite decisive. It was said, that the Court cannot judicially know that the Colonial Treasurer is, or how he can be authorised to receive, much less to collect, her Majesty's quit-rents. We will not here enter into that question. There is quite enough stated before us on oath, to show his *connexion with them, as a Crown Accountant*; and that is enough, for

(4) And see *Attorney-General v. Hallett*, 15 M. & W. 97 (notes of the Chief Justice).

1846. the purposes of the present motion. His authority to collect, and to
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 Stephen C.J. *lawful authority in Mr. Riddell to collect, and take measures for collecting
 the quit-rents, is distinctly sworn; and the allegation has not been
 denied.*

Lowe enquired whether the Court had considered the question of costs, and said that as the application had only been in part acceded to, and as the plaintiff had committed no error, the latter was entitled to costs.

THE CHIEF JUSTICE said the application had not been made by the defendants, against whom costs could be awarded, but by the Crown; and the applicants could not be compelled to pay costs, even if costs were awarded.

Order accordingly.

On a subsequent day an order was made by the Court, on the motion of the *Attorney-General, ex parte*, for the trial of the case at Bar.

Oct. 26.

Windeyer and *Lowe*, for the plaintiff, moved upon notice to set aside the order made during the previous term for the trial of the case at Bar. The application of the *Attorney-General* had been *ex parte* and acceded to in accordance with the practice in England in similar cases. A trial at Bar was always obtainable by the Crown in England, because the Sovereign not being specially named in the statute of *nisi prius*, 13 Ed. I, st. 1, c. 30, Her Majesty could refuse her assent to the issue of a writ of *nisi prius*, and upon the *Attorney-General* notifying to the Court that there had been such a refusal, the Judges had no other course open to them than to try the case at Bar, according to the old form. In this colony however the case was different, for there was no such thing as a writ of *nisi prius*, and as cases were tried before a single Judge without the issue of such a writ, there was no process from which the Queen could dissent.

THE COURT, without calling upon the *Solicitor-General* to show cause, held that the application must be refused. Although cases were not tried under a writ of *nisi prius*, the Courts stood in the same relationship towards each other, as in England, and no variation in mere form could deprive the Crown of the prerogative which it possessed in that country, and which were held for the advantage of the subject. As, however, the trial at Bar had been directed *ex parte*, and the present application was one against the Crown, it would be refused without costs.

The defendants in this case severed in pleading, and each pleaded several pleas. To some of each of these sets of pleas the plaintiff demurred; to the others he replied several matters. The defendants then demurred to some of each of these sets of replications, and rejoined to the others.

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These cross-demurrers were argued on November 6 and 11, by *Lowe*, for the plaintiff, and *Fisher*, for the defendants, and the Court reserved judgment. The grounds of the demurrers and arguments thereon are set out fully in the judgment of the Court, which was delivered by—

DICKINSON, J. This is an action of trespass. In the first count of the declaration the plaintiff complains of trespasses by the defendants in his dwelling-house; in the second count, the defendants are alleged to have trespassed on the plaintiff's goods.

Feb. 3.

The defendants have severed in pleading, and have each pleaded several pleas. To some of each of these sets of pleas the plaintiff has demurred. To the others he has (under the rule of this Court) replied several matters. The defendants have on the other hand demurred to some of each of these sets of replications, and rejoined to the others.

At the argument it was arranged that the points should be considered on the demurrer to the second plea of the defendant *Flood*, and upon the demurrers to the replications pleaded, secondly, to the first and third pleas of the same defendant. We allowed a separate argument on the plaintiffs and the defendant's demurrers respectively.

The second plea of the defendant *Flood* is to the effect, viz. : That on the 29th September, 1842, the Queen in right of her Crown, was seized in fee of a parcel of land, and granted the same in fee to the plaintiff, subject to a quit rent; that before the trespasses complained of, a sum for arrears of that rent became due, and that the dwelling-house mentioned in the first count of the declaration was then upon the said land; that the defendant *Riddell* had been previously appointed, and then was, Treasurer and Collector of internal Revenue of this Colony, and that it was his duty to collect, distrain, and take all lawful measures for the recovery of quit rents, forming part of the internal revenue of this Colony; and that the amount due from the defendant for quit rent as aforesaid, formed part of the internal revenue; whereupon the defendant *Riddell*, as such collector, and defendant *Flood*, as his bailiff, and assistant, entered the said dwelling-house to distrain for the sum so due from the plaintiff, and did destrain, &c.

1847. Various causes were assigned for demurrer to this plea, but the plaintiff's counsel resolved them at the argument into three, viz.: 1st. That the plea contained matters which were merely evidence of the defendant *Flood* being the Queen's bailiff, but no direct allegation that he was such officer. 2nd. That the defendant *Riddell's* office of Treasurer and Collector invested him with no authority to distrain for quit rents. 3rd. That the Queen had surrendered these rents to the Imperial Parliament in exchange for her Civil List, and that it was beneath her royal dignity to collect them for the Parliament.

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Both sets of demurrers were argued last term by Mr. *Lowe*, for the plaintiff, and Mr. *Fisher*, for the defendants.

The first objection of the plaintiff to the defendant's second plea is utterly misconceived. The plea states, no evidence of the defendant *Flood* being the Queen's bailiff. The plea states that Mr. *Riddell* is Treasurer and Collector of the Internal Revenue; it then alleges an inference of law, viz., his duty to distrain for the rents which he is to collect and that he therefore, as collector, and *Flood* as his bailiff and assistant entered to distrain.

In support of his second objection, Mr. *Lowe* went into a lengthened argument to show that by the law of England it is the sheriff's duty to collect the Crown debts, and that to do so he must be put in motion by the Baron of the Exchequer. He then cited several Acts of Parliament, and an Act of Prince Edward's Island to show, that powers had in certain cases been expressly given to the Crown officers to distrain, and that bailiffs must be known. From all which he concluded that the Crown could not give a power to any of its officers to distrain without the specific sanction of an Act of Parliament or Council. He cited *Sewell on Sheriff* pp. 508, 509, 512. *Milton's Case* (6); *Com. Dig. Viscomte (G.I.)*; *Jacob's Law Dictionary—Bailiff*; Act of Prince Edward's Island, from 2 *Howard's Colonial Law*, 174; *Statute West. II*, 13 Ed. I, 32; *Hen. VIII*, c. 20; 56 *Geo. III*, c. 16, *secs. 4 and 13*; 10 *Geo. IV*, c. 50, *sec. 90*; 7 and 8 *Geo. IV*, c. 68, *sec. 4*. In support of this argument we were also referred to the statutes 5 *Geo. II*, c. 7, *sec. 12*; 54 *Geo. III*, c. 15, *sec. 2*; 5 and 6 *Will. IV*, c. 62, *sec. 17*.

In answer to Mr. *Lowe* on this objection Mr. *Fisher* adduced (among others) this argument, viz., that the Colonial Legislature has in several instances recognised the Collector of Internal Revenue as a legal officer; that by the Act 3 *Wm. IV*, No. 8, *sec. 8*, (see *Callaghan's Acts*, p. 795), he is required to perform a specific duty; that the defendant, Mr.

Riddell was therefore appointed to a legal office ; that it was his duty to collect such rents as those mentioned in the plea, and that he was therefore entitled to distrain for them, a distress being one means for the recovery. For the last proposition he cited *Com. Dig—Attorney* (c. 15), and *Story on Agency*, pp. 49, 67, 68, 74, 75, 77.

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We have considered the respective arguments, and referred to the citations on either side, and assuming (for the present) that it is the Collector's duty to collect such rents as those mentioned in the plea. We are of opinion that this argument of Mr. *Fisher* is not touched by anything in any one of the statutes referred to by Mr. *Lowe*, and that it furnishes a complete answer to the second objection to the plea. The authority conferred on Mr. *Riddell* must on the general principles of the common law be so construed as to include all necessary or usual means of executing it with effect, *Paley on Principal and Agent*, Ed. 1, p. 137 ; *Story on Agency*, s. 85 ; *Bac. Abr., Authority (A)* ; *Com. Dig., Attorney*, c. 15. The incidental authority in a collector of rents to distrain for them is not more strange than that of a person to arrest for a debt which he is employed to recover, and both incidents seem equally included in the general proposition enunciated by *Paley* and Judge *Story*. We have heard no reason why by common law, this doctrine should not be as applicable to the monarch as to the subject, and there is nothing in any one of the statutes cited which interferes with its application to the case before us. The statute 32 Hen. VIII, c. 20, has obviously nothing whatever to do with the case. The statutes 56 Geo. III, c. 16, sec. 13, and 10 Geo. IV, c. 50, sec. 90, by which collectors of Crown rents are authorised to distrain, might appear to signify that the Legislature conceived that such officers could not distrain by the common law, but that those enactments were clearly necessary for enabling them not merely to distrain, but moreover to sell without any limitation as to time, and to subject them in the exercise of such powers to the control of the Commissioners of Woods and Forests. The statute 7 and 8 Geo. IV, c. 68, sec. 4, makes certain receipts of collectors effectual acquittances, and we think that enactment has no application to this case. As to the statutes 5 Geo. II, c. 7, sec. 2 ; 54 Geo. III, c. 15, sec. 2, and 5 & 6, Will. IV, c. 62, sec. 17, they apply merely to the kind of evidence the Crown may give in actions instituted by it in certain colonies.

The only question on this demurrer which remains is, whether it was Mr. *Riddell's* duty to collect the rents mentioned in the plea. Mr. *Lowe's* argument upon this was, that Mr. *Riddell* is only authorised to

1847. collect the Internal Revenue. He cited on this head the statutes 1 and 2 Vic. c. 1, secs. 2 and 12, and 18 Geo. III. He also quoted from *Wells on The Revenue*. To this Mr. *Fisher* replied, that the only revenues surrendered were those arising in Great Britain and Ireland, and that these rents were fixed and regular revenue. We are of opinion that these rents are part of the fixed internal revenue of the colony. They are from their nature fixed as distinguished from wreck, waifs, treasure trove, fines, &c., which are casual; they are internal, being derived wholly from the lands within, and from no sources without the territory. Assuming therefore (for argument's sake), that the surplus revenues of this colony have been surrendered to Parliament by the Statutes 1 & 2 Vic., c. 2, sec. 2, the whole internal revenues must be collected before the surplus can be ascertained, which the Queen is to hand over to Parliament. We think, therefore, that till the surplus is ascertained the Queen has the property in the whole of the ordinary internal revenue which her Collector is therefore the officer to get into the Treasury.

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We are of opinion, therefore, that the legal inferences set forth in the plea, are correctly deduced from the facts therein alleged, and that the plea has been rendered bad neither in substance nor in form by their introduction, though had the plaintiff traversed them, his replication would have been informal, and consequently we think that the second plea of the defendant *Flood* is a good defence to the first count of the declaration.

As the points arising out of the plea we have been considering are involved in each of the pleas of the defendant *Flood*, justifying as assistant to Mr. *Riddell*, as Collector of Internal Revenue, and in these pleas in which Mr. *Riddell* himself justifies by virtue of the same office, the like judgment will follow upon the demurrer to each of the last mentioned two sets of pleas, as upon the demurrer to the second plea of the defendant *Flood*.

The defendant *Flood's* first plea was that the Queen before the time of the trespass was seized in fee of a quit rent, in respect of land whereon the dwelling house in the first count mentioned, was erected, and that at the last mentioned time a sum of money for arrears being due, *Flood* as bailiff of the Queen, and by her command, entered the said dwelling house to distrain, and then and there did distrain &c.

The second replication to the first plea, was that *Flood* did not immediately remove the goods distrained in the dwelling house therefrom, but remained therein an unreasonable time, making a noise and disturbance.

In support of the demurrer to the last mentioned replication, Mr. *Fisher* cited *Rex v. Hill* (7); *Semayne's case* (8); and *Bac. Abr. Execution* (*M*), and argued that the Crown's distress was always in the nature of an execution, and therefore that it was necessary for the Crown's officer to remain on the land where the distress was made; Mr. *Lowe*, on the other hand, argued that the Crown was bound at once to remove the goods distrained, from the land where they were taken. Mr. *Fisher*, moreover, argued both on this demurrer, and on that to the second replication to the third plea of the defendant *Flood*, that if the acts mentioned in those replications were trespasses yet as there was nothing to show that the defendant *Flood* entered with the intention of committing them, they did not make him a trespasser *ab initio*. Mr. *Lowe* argued that each of these replications showed a trespass, which (as the plea disclosed an entry by act of law) made *Flood* a trespasser *ab initio*. He relied on the *Six Carpenters case* (9). The case of *Smith v. Egginton* (10), being mentioned by the Court as helping the argument of Mr. *Fisher*, Mr. *Lowe* then cited *Com. Dig., Trespass* (c. 2), *Reed v. Harrison* (11); *Aitkenhead v. Blades* (12).

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We are of opinion that the plaintiff's second replication to the first plea of the defendant *Flood* is good. In *Com. Dig., Distress* (D. 1), it is laid down, that in cases of distress for rent the goods shall be removed immediately, or within a convenient time; in the same title (D. 7), that such a distress cannot be sold. But with regard to the latter rule, this exception is stated—"Yet by the common law the King might sell it." It appears, therefore, that the author had the King's right as distinguished from those of a subject, in respect of distress, under his consideration. He states, however, no right in the Crown to stay upon the premises after distraining; and as no case has been cited to show us that the Crown had such a power at common law, we conclude that none such existed. The second plea, by stating "that *Flood*, as the Queen's bailiff, and by her command entered to distrain, &c," shows that defendant entered by general authority of law, and not to obey a specific command of a superior. We think that the first plea shows *Flood* to have been more in the situation of the purveyor mentioned in the *Six Carpenters' case* than in that of the sheriff in *Smith v. Egginton* (13), who entered in obedience to a writ from the Court of Chancery, *Bagshawe v. Goward*, Cro. Jac. 147. It appears to us that with respect to the doctrine of a subsequent trespass by a man entering

(7) 6 Price 19. (8) 5 Rep. 45. (9) 8 Rep. 290. (10) 7 A. & E. 167.
(11) Wm. Bl. 1218. (12) 5 Taunt. 198. (13) 7 A. & E. 167.

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under act of law, making him a trespasser *ab initio*, there is a clear distinction between the case of him who enters by virtue of some general authority conferred on him, and that of him who enters in obedience to a special mandata. In the former case it may well be presumed that he who enters by virtue of the law set in motion by himself, and afterwards misbehaves, entered under the semblance of law for the purpose of committing his misconduct; but such a presumption would be unreasonable in the case of him who enters because the law has set him in motion. Here there is an ambiguity, as the plea states that "*Flood* entered as the Queen's bailiff, and by her command," the latter words implying, though not distinctly, a special command for the particular occasion mentioned in the plea. We consider those words, however, referable to his original appointment as Queen's bailiff; and if the ambiguity cannot be removed, it must be taken most strongly against the defendant, who has used the doubtful words.

We are of the opinion, therefore, that the plea shows the defendant *Flood* entered the dwelling house by general authority of law, and that the second replication to the plea, by alleging that he subsequently committed an act of trespass, (viz., remaining in the house an unreasonable time after the seizure—*Griffin v. Scott* (14); *Winterbourne v. Morgan* (15), per *Le Blanc J.*, and *Bayley J.*), is good, as it shows him to have been a trespasser *ab initio*.

The defendant *Flood*, in his third plea, alleged that the goods mentioned in the second count of the declaration were seized for the same quit-rent as that specified in his first plea, and by him in the same character as therein set forth.

The second replication to the third plea was, that *Flood* sold the goods before the expiration of fifteen days next after the seizure of them.

In support of the demurrer to the last mentioned replication, Mr. *Fisher* argued that at the common law the Crown had the prerogative power of selling distresses at any time. That the statute 51 Hen. III, c. 4, which prohibits the Crown from selling till after fifteen days from seizure, being a statutory limitation of a common law prerogative of the Crown, has no application to a colony, and therefore that in this dependency the Crown may sell distresses at any time. In support of this argument he cited *Com. Dig., Prær. (A.)*; *Com. Dig., Ley. (A.)*; (C); *Clark's Colonial Law*; *Lewis on Dependencies*; *Attorney-General v.*

(14) 2 Ld. Ray, 1424, and Strange, 717. (15) 11 East 395.

(16) 2 Meriv. 143.

Stewart (16) *Vin. Abr. Præc. (T.2)*. He moreover argued that the sale was warranted by the statutes 2 Will. and M., Sess. 1, c. 5, and 4 Geo. II, c. 28, sec. 5, as the Crown might take advantage of them, though not so named therein, as to which he cited *Bac. Abr. Præc. (E.5)*; *Chitty's Præc.* 382. He also cited *Gilb. Excr. pp.* 115, 123. Mr. *Lowe* in answer cited *Co. Litt.* 476; *Child v. Chambers* (17); *Bradley*, p. 15; stat. 51, Hen. III, c. 4; 22 Car. II, c. 6, sec. 8; stat. 11 Geo. II, c. 19, s. 10, 19, 20, and 22; 33 Hen. VIII, c. 39, s. 54, *Vin. Abr. Præc. (2.)* (14). *R. v. Archbishop of Armagh* (18); *Wilson v. Tummon* (19). He also cited several statutes where powers of selling within a limited time were given to the subject. He argued that the Crown was in this Colony bound by the statute 51 Hen. III, c. 4, and therefore could not sell distresses within fifteen days from the seizure. That the statutes 2, Will. and M., Sess. 1, c. 5; Geo. II. c. 28, sec. 5; and 11 Geo. II, c. 19, do not apply to the Crown as they only contemplate cases where by the common law the distrainer has no power to sell. That there was only one authority to show that the King may take advantage of a statute, though not named in it, viz. :—The case of "*a fine levied by the King, &c.*" (20). That it was a decision in the time of James I, and of *Popham* and *Coke*, and that therefore the Court would not be influenced by it. Mr. *Fisher*, in reply, answered the last method of viewing the decision in 7 Rep. by reading the judgment of *Abbott*, C. J., in *Rex v. Woolf* (21).

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We have seen that at the common law the Crown might sell a distress. By statute 51 Hen. III, c. 4, it is enacted that such sale must not be within fifteen days from the distraining. None of the reasons adduced satisfy us that the statutes which have limited the prerogatives of the Crown are inapplicable to this Colony, or have no force generally in dependencies; and the proposition is so startling that it requires a decision in point, a legislative declaration, or the most conclusive reasoning, to warrant its entertainment. Like some other questions which have been agitated in this Court, we think the *onus probandi* rests upon the proposer so completely that we are not called on to demonstrate its unsoundness. We are not called on to say whether the Crown can take advantage of a statute in which it is not named, because with respect to the rents mentioned in the plea, no alteration has been made by the statute 2 Will. and M., Sess. 1, c. 5; for that enactment, by its preamble, appears to have contemplated only those persons who could not

(17) 5 B. and Ad. 1051. (18) 8 Mod. 5. (19) 1 Dowl. and L. 513.

(20) 7 Rep. 32. (21) 2 B. and Ald. 609.

1847. by the common law sell distresses for rent, and applies only to cases of
 WINDEYER rent reserved upon demises and special contracts ; nor by the statute
 v. 4 Geo. II, c. 28, sec. 5, as that applies only to cases of rent seck, rents
 RIDDELL. of assize, and chief rents. Now the rent mentioned in the plea cannot
 Dickinson J. be a rent seck, as the Crown is not bound by the statute *quia emptores*.
 It is neither a rent of assize, nor a chief rent, as they issue out of manor
 lands (*Cruise's Digest*, Ed. 2, vol. 3, Rents Ch. 1, s. 14), of which there
 are none in this Colony. We are of opinion, therefore, that the goods
 taken ought not to have been sold till after the expiration of fifteen
 days from their seizure.

We think, however, that the second replication to the third plea does
 not show that the defendant *Flood* was a trespasser *ab initio*, as it does
 not state any act of trespass committed by him. All that the replica-
 tion states is a sale at an improper time ; but such sale may have taken
 place without the defendant *Flood* or his vendee touching or even seeing
 the goods ; for all that appears in the replication the vendee may
 never have taken the goods which he would have had no right to take
 without tendering the price agreed on, 2 *Bl. Comm.* 448. Within the
 language of the *Six Carpenters' case* the replication discloses no act of
 trespass which demonstrates that the defendant *Flood* was originally a
 trespasser. We think, therefore, that the last-mentioned replication is
 bad.

The judgment of the Court will be entered for the defendants upon
 the plaintiff's demurrer to their 2nd, 5th, 6th, 9th, and 10th pleas
 respectively. Judgment will be entered also for the defendants on their
 respective demurrers to the 2nd replication of the plaintiff to the defend-
 ants' 3rd, 4th, 7th, and 8th pleas respectively. Judgment is to be entered
 for the plaintiff upon the defendants' several demurrers to the 2nd repli-
 cation to the defendants' 1st plea respectively.

Lowe applied to the Court for leave to reply on the pleas which their
 Honors has sustained, upon the ground that as the case was a novel one,
 the plaintiff had adopted the best and most respectful course by taking
 the opinion of their Honors on the point of law instead of replying
 generally as he might have done.

THEIR HONORS were of opinion that, considering all the circumstances
 of the case, the leave applied for ought not to be granted.

Order accordingly.

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Pleading—Trespass to land—Allegation of trespass to goods included—Aggravation or substantive trespass.

May 9.
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and
a'Beckett J.

The declaration stated a trespass upon the plaintiff's close by the defendant, and a seizure and conversion of his chattels also on the said close. Plea, that the close was the defendant's. The question was whether the trespass to the goods was a substantive grievance, or merely an aggravation of the trespass to the close.

Held, that the plaintiff's demurrer to the plea was good, that the taking of goods cannot be supposed any part of the manner in which the close was trespassed on, and that the language of the declaration did not warrant the defendant in supposing that it was alleged as a mere aggravation of the trespass to the close.

ACTION of trespass ; demurrer to plea. The facts and arguments are fully set out in the judgment of his Honor, Mr. Justice *Dickinson*.

The judgment of the Court was delivered by—

DICKINSON, J. The declaration in this case states that the defendant broke and entered the plaintiff's close, and made a noise and disturbance therein, and seized and converted to the defendant's use certain chattels of the plaintiff's, being in the said close.

The defendant has pleaded—1st, the general issue ; 2nd, that the close is not the plaintiff's ; 3rd, that the close is the defendant's freehold.

The plaintiff has replied to the first, and demurred to the second and third pleas. The demurrers were argued before us yesterday, when the defendant waived all contest on the second plea, as he considered the case of *Welch v. Nash* (2) decisive against it. We are of the same opinion, and think that the second plea cannot be supported. As to the third plea, the plaintiff's counsel, Mr. *Darvall*, argued that it was bad, inasmuch as the mere averment that the close was the defendant's freehold was no justification for the trespass to the plaintiff's goods which were thereon. He contended that the trespass to the goods was a substantive injury, and not an aggravation of the trespass to the close, and that the case of *Welsh v. Nash* (2) was as decisive against the third as the second plea. He moreover cited, and relied on *Phillips v. Howgate* (3) ; *Dyson v. Colick* (4) ; *Bush v. Parker* (5) ; and *Wm. Saunders* 28, note 3.

(1) *The Sydney Morning Herald*, May 9 and 11, 1846. Cited 2 S. C. R. 324.
(2) 8 East 394. (3) 5 B. & Ald. 220. (4) 5 B & Ald. 600. (5) 1 Bing. N.C. 72.

1846. The defendant's counsel, Mr. *Broadhurst*, contended that the trespass to the goods was a mere aggravation of the trespass to the close, which, being the gist of the action, was all that the defendant was obliged to plead to, and that the plaintiff should have replied or newly assigned the trespass to the goods. He cited in support of his argument *Taylor v. Cole* (6); *Gargrave v. Smith* (7); *Gates v. Bayley* (8); *Dye v. Leatherdale* (9).

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We have referred to the cases cited, and have considered the pleadings, and the arguments urged before us. The difficulty in cases of this kind is to determine whether a given trespass is complained of, specifically as a substantive grievance, or whether, from the statement in the declaration, it appears to be merely an aggravation of some other, for which the action is really brought. We advisedly use the word *appears*, for it frequently turns out by the replication to be a substantive trespass, which makes the defendant a trespasser *ab initio*, or by a new assignment to be a distinct grievance, for which alone the defendant is liable. If then, upon the face of the declaration in this action, the trespass to the goods appears to be a distinct grievance, the third plea is bad for not justifying it in terms: if, on the other hand, it appears to be a mere aggravation of the trespass to the close, then the plea would be good, as a justification to what is *apparently* the gist of the action.

On consideration of the cases *Taylor v. Cole*, *Gargrave v. Smith*, *Gates v. Bayley*, and *Dye v. Leatherdale*, we think that the expulsion mentioned in the first case is apparently a description of the manner in which the entry on the close was conducted; that had the conversion been alleged in the declaration in the second of those cases, it would have appeared descriptive of the trespass to the goods; that in the third case the keeping of the beast so close that it died, appears indicative of the mode of the impounding complained of; and that the conversion of the hog in the fourth seems a mere circumstance of the taking.

On perusing the declarations in the several cases of *Phillips v. Howgate* and *Bush v. Parker*, the striking the plaintiff *appears* in the first of those cases, to be put as a distinct trespass from the breaking and entering the house, and the forcing through the pond in the latter of those decisions is apparently described as a trespass additional to the first assault. From a comparison of these two classes of cases, we think

(6) 3 T.R. 292.

(7) 1 Salkeld, 221.

(8) 2 Wilson, 313.

(9) 3 Wilson, 20.

(referring to the language of Judge *Bosanquet*, in the case last mentioned) that in the case before us the question is, whether the trespass to the goods mentioned in the declaration appears to be therein described as part of the *manner* in which the trespass to the close was committed, or to be complained of as a substantive trespass. Considering the difference of the subject matters of the alleged trespasses, we think that though the conversion thereof may be part of the manner of taking the goods, yet the taking the goods cannot be supposed any part of the manner in which the close was trespassed on. We think, therefore, that the language of the declaration did not warrant the defendant in supposing that the plaintiff complained of the trespass to the goods as a mere aggravation of that upon the close, and that the third plea ought to have justified the grievance to the goods, and is therefore bad for not having contained that justification. The plaintiff is therefore entitled to the judgment of the Court upon the demurrers.

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Application for leave to amend was made by Mr. *Broadhurst*, and granted on payment of costs, the Court intimating that owing to the minuteness of the distinction, they would have done so without costs, if they could have found a precedent for it.

Demurrer upheld. Leave to amend, on payment of costs.

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Feb. 10. *Crown lands—Intrusion—Reservation in grant—Tenure of land in N. S. Wales—*
Stephen C. J. Boundaries—"Office" found—Damages—Monopoly—21 Jac. I, c. 14—21
Dickinson J. Jac. I, c. 3—12 Car. II, c. 24.

and
 Therry J.

Sixty acres of land at Newcastle were granted by the Crown in 1840 to D., under whom defendant claimed as lessee, the grant, after the usual words of limitation, and reservation of a quit rent, containing the following clauses, "provided nevertheless, and we do hereby reserve to ourselves all such parts and so much of the said land as may hereafter be required for a public way or ways, . . . and also all stone and gravel, . . . and all land within one hundred feet of high water mark, . . . and also all mines of gold and silver, and of coals, with full and free liberty and power to search for, dig, and take away the same." In a subsequent part of the instrument there were provisos for making the grant void, "if the conditions, reservations, and provisos therein contained," should not be duly observed. Upon this land defendant mined for coal.

Held, the word *reserve* created an *exception* in the grant, and therefore that the veins of coal, being severable from the land, remained as a *corporeal* hereditament in the Crown, and were properly the subject of an information of intrusion. No "office found" was necessary, the right not being founded upon the breach of a condition, but upon an intrusion into soil, always the property of the Crown.

The waste lands of this colony are, and ever have been, from the time of its first settlement in 1788, in the Crown; and they are, and ever have been, from that date, (in point of legal intendment,) without office found, in the Sovereign's possession; and, as his or her property, they have been and may now be effectually granted to subjects of the Crown.

At the time of making a grant of land to a subject the Crown must be presumed to have had a title to that land, and this *original* title, as the foundation and source of all other titles, is matter of judicial cognizance. The feudal principles, that all lands are holden mediately or immediately of the Crown, is equally in force in New South Wales as in England.

Quære, whether the 21 Jac. I, c. 14, is in force here? Estates in land here are not *allodial*, but tenures in free and common socage, and there is nothing in a quit rent inconsistent with this tenure.

The boundaries of the land in the above information were fixed by the actual bearings without allowance for the magnetic variation, *held*, although the grant must be taken to have referred to the *true* bearings, there was no variance.

An information of intrusion resembles an action of trespass, and damages therefore are recoverable, where things valuable are taken away, whether in form demanded or not.

There is nothing in the operation of the above grant tending to a monopoly in the sale of coals.

Statutes, 35 Hen. VIII, c. 14; 37 Hen. VIII, c. 20; 35 Eliz. c. 3; 21 Jac. I, c. 3; 12 Car. II, c. 24, mentioned.

New trial motion in a case in which the jury had found a verdict for the plaintiff, with nominal damages, on an information of intrusion

(1) *The Sydney Morning Herald*, July 22, 1846, and Feb. 11, 1847, and 2 S.C.R. App. 30. Cited 2 S.C.R. App. 7; 3 S.C.R. 23; 9 S.C.R. Eq. 127; 5 N.S.W. L.R. 278.

by the *Attorney-General*. The facts and argument (2) appear from the judgment of the Court, which was delivered by—

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THE CHIEF JUSTICE. This was an information of intrusion, for entering upon certain coal mines and veins of coal, to wit, the mines and veins of coal in and under a piece of land in the County of Northumberland, containing sixty acres, in the information described, and digging out of and carrying away from the same large quantities of coal and other materials. The information, in the ordinary form, stated the mines and veins in question to have been and to be lawfully in the Queen's possession, in right of her Crown; and that the defendant intruded into such possession. Plea, not guilty; that is to say, that the defendant did not so intrude. The case was heard before Mr. Justice Dickinson, when a verdict was returned under His Honor's direction for the Crown; but in the absence of sufficient evidence as to damage, with nominal damages only.

At the trial, the *Attorney-General* maintained that the Queen's title was admitted, on the record; and that the only question was, whether the defendant had intruded. He went into proof, however, of title. It then appeared that the Crown in the year 1840, had granted the sixty acres described in the information to one *Dumaresq*, under whom the defendant was lessee. But, in the grant, after the usual words of limitation, and reservation of a quit-rent, there was the following clause or proviso "Provided nevertheless, and we do hereby reserve to ourselves all such parts and so much of the said land as may hereafter be required for a public way or ways"—(then followed, "and also all stone and gravel," &c., "and all land within one hundred feet of high water mark," &c.)—"and also all mines of gold and silver and of coals, with full and free liberty and power to search for, dig, and take away the same." In a subsequent part of the instrument there were provisos for making the grant void, "if the conditions, reservations, and provisos therein contained," should not be duly observed.

The entry into the mines of coal by the defendant, was clearly proved. It was objected, however, that he had a right to make such entry, and dig for and carry away the coals, as he might think fit. First: The coals, it was insisted, were not *excepted* from the grant; but the Queen merely reserved the right, when she thought fit, of coming and taking them. It was a reservation of mines, of something which

(2) The argument occupied three days and is very fully reported in *The Sydney Morning Herald* of July 22, 1846, but the various reasons therein adduced are all referred to in the judgment.

1847. did not exist when the grant issued. A mine was a thing that had to be made. The Queen, it was admitted, might then take the coals. But the defendant might take them also; or, at all events, he might do so, until the Queen actually claimed herself to exercise that right, which it was not pretended that she had done, or ever claimed to do. If the words amounted to a *reservation* only, and not an exception, the proceeding by information of intrusion would in any event not lie. Secondly: It was contended that the clause or proviso itself, whether reservation or exception was void, under the statute of James the First, as tending to create a monopoly; since the Crown, by granting mines of coal, and the right of digging for them, to one party, and denying them to another, might throw the trade in that article into one channel, to the exclusion of every other person or party. Thirdly: It was submitted, however, that the grant itself proved nothing against the defendant in any point of view; for that his possession must be taken to be in a lawful possession, until a title (or, rather a better title), was shown, in some one else; and that here, the Crown had shown no title. The defendant's counsel maintained that there was a material difference between *dominion*, or the right of sovereignty over the soil and country, which were unquestionably in the Crown, and the *possession* or the *title to the possession* in or of that soil, with power to grant the same at her discretion, which title he broadly denied. Fourthly: The defendant objected that there was a variance in the proof of the boundaries, as set out in the information by reason that these (which were taken from the Grant) must be understood to refer to the true points and bearings mentioned, after allowance made for the magnetic variation; whereas the land granted was, as stated by the Surveyor, described according to its actual bearings by the compass, without making any such allowance. The defendant, therefore, it was said, had not trespassed on the spot or place mentioned, and was, consequently, in any event, not guilty of the intrusion charged.

The Judge directed the Jury on the several points as follows:—He observed, first, that they had nothing to do with any question of monopoly. As to the Queen's right to possession, His Honor did not concede to the *Attorney-General* that the Crown's title was admitted on the record. He thought that the question was open; but he said that the right to the soil arose, and became vested in the Crown throughout the Colony at and from the time of the first landing of British subjects in the Colony for the purpose of forming a settlement on it. With respect to the boundaries mentioned, His Honor told the Jury that if the defendant entered on any spot or place lying, in fact, within those

boundaries, that would be sufficient, although the sixty acres granted, or intended to have been granted, might be incorrectly described by them. On the construction of the grant the Judge observed that the land was given, subject to certain provisions, and with certain so-called reservations, of which one was, for instance, of land required for roads, and another was of mines of coals. He said that the question whether mines or veins of coals passed under such an instrument was independent of any mere distinction between technical terms ; that the nature of a thing could not depend simply on the word used to describe it, and His Honor thought that the clause relating to the coals, in point of law, amounted to an exception. So that he concluded if the defendant had really dug for and taken coals within the boundaries mentioned in the information, or under land within those boundaries, he was guilty of the intrusion complained of.

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A new trial being moved for, the several objections mentioned were again urged, with some others, of which we shall dispose in their order, tending first to impeach the title of the Crown ; and, secondly, to show that, supposing the Crown to have title, the proviso or reservation in its grant was void. The defendant's case was most elaborately argued on all these grounds by Mr. *Windeyer* and Mr. *Lowe*, shortly answered by the *Attorney and Solicitor General* and Mr. *Broadhurst* for the Crown, in the second and third terms of the last year, when the Court reserved its judgment. We have availed ourselves of the leisure afforded by the vacation to consider the many novel questions raised, and to look into the various authorities cited, and we are of opinion that all the objections, notwithstanding the labour and learning expended on them, are unfounded, and that the verdict must stand.

First, as to the variance in the description of the boundaries. The lines or bearings mentioned in the grant, and forming, or intended to form, the boundaries of the sixty acres, which are thereby expressed to be conveyed, may be taken to be the true lines ; and the actual boundaries of the sixty acres, as occupied, may, having reference to the present magnetic variation, be taken not to be thereby truly described. But the fact is, nevertheless, that the land under which the coals lay was, and is, truly described by the said lines. The defendant entered on a mine or vein of coals, situate under a piece of land bounded by the exact lines or bearings ascribed to it in the information. The land is said, however, to contain sixty acres, and it was supposed that therefore the exact boundaries of those sixty acres must be described. But it appears to us that the bearings of that particular farm, as such, were not in question ; and

1847. that the Crown only undertook to prove that the defendant intruded into a mine or vein lying under some land containing sixty acres, in Northumberland, bounded as mentioned in the information. Now, an entry into or under land answering the description there given has been shown, and there is consequently no variance. If we thought otherwise, however, as our opinion is against the defendant on all the other points, we should not grant a new trial on this alone. Such a course could not benefit, and might seriously injure, the defendant, as the *Attorney-General* could amend his information, and might on a second trial, perhaps, prove and recover extensive damages.

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Secondly. As to the Crown's title to land, in this Colony, it was boldly asserted, and endeavoured to be shown, that the Crown has not and never had any property in the waste lands of the Colony—that is, any beneficial ownership or right to grant any of them without authority of Parliament. The Queen had, it was said, the sovereignty and *dominium directum* in the soil. The Sovereign was the *ultimus hæres*. But he could exercise no act of ownership against a subject. Thirdly. The Queen was at all events, it was urged, not *in possession*; not entitled to maintain trespass, or bring an information of intrusion, which assumes that she had possession. There was an occupancy as against foreign powers, but this was rather a possession in the people than in the Sovereign. The Crown could only take land, that is to say, have title thereto exclusive of its subjects, by *matter of record*, and there should have been, consequently, an “office” found, or some equivalent proceeding to show title in this case.

We will dispose of these two objections together. We omit a variety of topics introduced in aid of them, with which we have, as Judges, nothing to do and which were indeed of too popular a character, merely, to justify further notice by us. We are of opinion, then, that the waste lands of this Colony are, and ever have been, from the time of its first settlement in 1788, in the Crown; that they are, and ever have been, from that date (in point of legal intendment), without office found, in the Sovereign's possession; and that, as his or her property, they have been and may now be effectually granted to subjects of the Crown. It might not have been necessary for us, perhaps, to determine the last of these positions, but for the course taken in the argument, which has rested the case, in a great measure, on the validity of the Grant under which the defendant claims—or, at least, of the reservations therein. But, as the right or power of the Crown to convey was itself contested, the validity of the whole instrument came in question. We will assume

that the title of the Crown to the mines was legitimately in contest—that, in other words, it was not admitted on the record. This, however, will not help the defendant, if the Grant under which alone he can claim be invalid. If the Queen's original title—that is, to all lands in the Colony—be established, with its legal corollary possession, the defendant must, by some effectual instrument or means, defeat that title, or the Crown's claim is unanswered, and himself without defence. We have not been called on to say whether the Crown's title was or not so admitted. The point was certainly suggested at the trial, but no authority was then cited on it, and the subject on the argument in banc was not adverted to. No plea, however, was in this case pleaded, except not guilty; and it is laid down generally in the books that no other matter is then in issue but the intrusion. The exception introduced by the statute 21 Jac. I, c. 14, where the Crown has been out of possession twenty years, sufficiently proves that rule. In the recent case of *Hatfield v. Alford* (3), we expressed considerable doubt whether the statute of James extends to this colony. The defendant's title here, however, had been entered into and considered under not guilty only, as it would have been were that statute in force, and the defendant in fact within its provisions. Our decision in the case just referred to (pronounced after the termination of the arguments in this), relieves us from the necessity of saying more on that point. The Court there, however, decided two others of more importance, on which we have to express an opinion now. The one was, that at the time of making a grant of land to a subject, the Crown must be presumed to have had a title to that land; and the other, that lands in this Colony—that is to say, its title *originally*, as the foundation and source of all other titles—is matter of judicial cognizance.

We see no reason, on fuller reflection, for distrusting either of those opinions. The territory of New South Wales, and eventually the whole of the vast island of which it forms a part, have been taken possession of by British subjects in the name of the Sovereign. They belong, therefore, to the British Crown. For this we need not refer merely to history. The fact of the settlement of New South Wales in that manner, and that it forms a portion of the Queen's Dominions, and is subject to and governed by British laws, may be learned from public colonial records, and from Acts of Parliament. New South Wales is termed in the statute 54 Geo. III, c. 15, and in the 59 Geo. III, c. 122, *His Majesty's Colony*; not the colony of the people, not even the colony of the empire.

(3) Oct., 1846, post.

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1847. It was maintained that this supposed property in the Crown was a fiction. Doubtless, in one sense, it was so. The right of the people of England to their property, does not in fact depend on any royal grant, and the principle that all lands are holden mediately or immediately of the Crown flows from the adoption of the feudal system merely (*Co. Lit.* 1, and *ibid.* 191, a, Mr. *Buller's* note 6; *Bac. Ab. Prerog. B.*; *Vin. Ab.* same title K.A. 19.) That principle, however, is universal in the law of England, and we can see no reason why it shall be said not to be equally in operation here. The Sovereign, by that law is (as it is termed) *universal occupant*. All property is supposed to have been, originally, in him. Though this be generally a fiction, it is one "adopted by the Constitution to answer the ends of government, for the good of the people." (*Bac. Ab. ubi supra*, marginal note.) But, in a newly-discovered country, settled by British subjects, the occupancy of the Crown with respect to the waste lands of that country, is no fiction. If, in one sense, those lands be the patrimony of the nation, the Sovereign is the representative, and the executive authority of the nation, the "moral personality" (as *Vattel* calls him, *Law of Nations*, book 1, chap. 4), by whom the nation acts, and in whom for such purposes its power resides. Here is a property, depending for its support on no feudal notions or principle. But if the feudal system of tenures be, as we take it to be, part of the universal law of the parent state, on what shall it be said not to be law, in New South Wales? At the moment of its settlement the colonists brought the common law of England with them. So much, at all events, they introduced, as was consistent with their then conditions. "Such, for instance," says *Blackstone*, "as the general rules of inheritance." The same has indeed been said of the statute law, but this is not now in question. Speaking of the exceptions, he observes that the artificial refinements and distinctions incident to the property of a great and commercial people, are not in force in the colonies, as being neither necessary nor convenient for them. No such observation, however can apply to a rule so convenient, if not so essential (even though founded solely on a fiction, or a technicality) as that which vests the property in waste lands in colonies in the Sovereign. But *Blackstone*, we apprehend, in the place cited, was considering the applicability of the statute, not the Common Law, and the feudal principle of which we speak, we have no doubt, is as much in force in the colonies as the law which provides for the succession of the eldest son.

Enough has, perhaps, been said on this point. We will refer, however, to precedents; and to Acts of the Legislature, both at home and in this colony. In the late Act, of 5 and 6 Vic., c. 36, the waste lands

of the Crown, and (in the title) the waste lands belonging to the Crown, in the Australian colonies, are mentioned. It will hardly be disputed, that by these words were meant all the waste and unoccupied lands of the colony ; for, at any rate, there is no *other* proprietor of such lands. In the statute, 10 Geo. IV, c. 22, reciting that divers of His Majesty's subjects had settled in certain wild and unoccupied lands in Western Australia, it is said that they have done so by His Majesty's consent and license. In the Australian Agricultural Company's Act, the 5 Geo. IV, c. 86, established "for the cultivation and improvement of waste lands" in this colony, it is enacted that, in case a charter shall be granted to them, the Company may lawfully hold all such lands as shall be granted to them by His Majesty. In Chief Justice *Stoke's* book on the North American Colonies, published in 1783, the usual clauses of a Governor's Commission are published ; and among them is one giving him power to grant lands. In Mr. *Chalmer's* Collection of Opinions, there will be found numerous instances stated, of grants of land in the American Colonies, made by Kings and Queens of England. One by *William and Mary*, granting lands in New England ; reserving all trees above a certain size. Another by the same monarchs, reserving one-fifth of all the gold that should be produced. One by *Charles the Second*, reserving an annual rent of forty beaver skins. One by *James the First*, in the year 1620. One by *George the Second*, of seven-eighths of all the lands in Georgia (4). The Crown's right to make such grants seems recognised by the Statute 7 & 8 Will. III, c. 22, s. 16, by which the Crown's patentees are restrained from selling, without license, to any other than natural born subjects of the Crown. The same right is assumed by Lord *Hardwicke*, in *Penn v. Lord Baltimore* (5). That was a contest between two proprietors of American provinces ; granted by the Crown to them, to be holden in free and common socage. In short, the instances are innumerable. From the time when colonies were first known, there is no example of a grant of lands in them, except by the Crown alone. In this colony, there are probably some thousands of such grants ; and very many, with provisos and restrictions similar to those in the present case. The discovery has been made, however, in this late age, and by lawyers of this bar, that these titles are without foundation. If such be the law, it is fit that it should be so declared, by a higher Court than this. The appellate tribunal is open to the defendant, and the case may be taken there. I have not yet introduced, however, the colonial enactments. In several of these, (the Acts for restraining the unauthorised occupation of the waste lands of this

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(4) 1 Chal. 18, 33, 59, 148.

(5) 1 Ves. Sen. 449.

1847. colony,) the Crown lands are mentioned *eo nomine*: and their unauthorised occupation is said, expressly, to be derogatory to the rights of the Crown. In the Acts for appointing Commissioners to report on disputed Claims to Grants of Land, the power of the Governor to make grants, on behalf of the Crown, is assumed. By the 6 Will. IV, No. 16, that power is recited, and mentioned to have been exercised informally; and then, by the express assent of His Majesty, also recited, all former grants of land by governors are confirmed. In this Act, and in the 3 Vic., No. 1, to confirm certain other grants, supposed to have been informal, the title of the Crown to the waste lands, and the right to grant them, are too plainly recognised to admit of question. To show further, after what has been adduced, that a finding by "Office" was unnecessary, to entitle the Queen to lands in this colony, or to maintain an information of intrusion in respect of them, would be a waste of time. Where the Queen is entitled, she is supposed to be in possession. The Crown cannot be disseised: nor can there be any occupant, as against the Crown, (for any other purposes than those mentioned in the 21 Jac. I, c. 14) of any possessions of the Crown. The reason assigned is, that no subject can take from the Crown except by record; and therefore a mere act *in pais* cannot avail a defendant. And, because the Queen cannot be supposed to be out of possession, she cannot have ejectment; or other remedy, which is founded on or supposes an eviction (*Bac. Ab. Prerog.* E. 3.—*Vin. Ab.* same title Q. 4 and B. d. 4. Also, *Ch. Prerog.* 334; note *h*, and 12 East. 104). It is not universally true, that the Crown can only take by matter of record, even from a subject (*Ch. Prer.* 249). As, for instance, in the case of lands "of an *alien in this realm ratione guerre*." And the reason given is remarkable:—"because the King's title is *notorious enough*, although it appear not of record" (*ibid.*) But all the instances where the King is said only take lands by record, are where he takes from a subject. (*Vin. Ab. Prerog.* Z. c., and *Ch. Pr.*, *ubi supra*.) The idea that he cannot acquire lands in a newly settled country, by discovery, and the settlement of his subjects therein (facts which must be always notorious, and speedily a matter of history), but must resort to the form of an "office" to give him title, appears to us scarcely to admit of serious refutation.

Fourthly. We come now to the objection, that supposing the Grant to be good, the clause reserving the mines of coal to be void, under the 21 Jac. I, c. 3, as *tending to a monopoly*. The argument on this has been already stated. In *Comyn's Digest* (Trade D. 4), the author defines a monopoly; and then, mentioning its consequences, adds—"therefore every grant which tends to a monopoly will be void." There

follows in illustration of this proposition, an enumeration of instances ; such as, a grant of the sole making of cards for twenty-one years, the sole making of ordinance in the time of war, the sole exportation of kerseys, the sole importation of cards, that goods shall only be imported at a particular port ; and the like. In every one of these, the tendency of the grant is towards a monopoly, and necessarily so, by its own intrinsic operation. But there is nothing, in the intrinsic operation of the clause in question, in this case, tending to a monopoly in the sale of coals. It is true that, by matters extrinsic, such as those suggested for the defendant, supposing them all to concur, the reservation might become an ingredient, in the creation of such a monopoly. But it is a maxim, that *in jure proxima non remota spectantur* ; and the possibility or probability of facts, that may or may not happen, or have happened, can form no ground for adjudging a provision void, which in itself has no indication of such consequences. No case like the present, in any degree, was cited ; nor any authority, showing that a mere reservation like this is within the statute. It is not within the definition of a monopoly, as given in *Comyn* and by Lord *Coke* (6). It is not like any one of the instances there given, or mentioned in *Bacon*, title Monopoly. Neither does the statute, having regard to the offences there enumerated, appear to contemplate any such case as this. The things prohibited are—all *monopolies*—(but this is not in itself, pretended to be a monopoly) all grants *of or for the sole buying, selling, or making of anything*,—and all matters any way *tending to the instituting or furthering of the same*. The latter portion of the enactment is that relied on. The argument is, that therefore the Crown must either grant all its land or none. If it grants, it can reserve nothing, if not coals, why timber ? This construction, we clearly conceive, would be a forced one, doing violence to the intention. That intention plainly was, to enable every man to trade unreservedly with his own property ; and to be, in respect of that property, on an equal footing with others, But the effect we are asked to give the Act is, to enable men to acquire property not their own ; not to restrain the Crown from intermeddling with the rights of others, but from dealing with and disposing of its own rights : to hold, in short, that (lest a monopoly might incidentally be created) because the Crown grants or may grant coals to one man, therefore, it shall and must grant them also to all men.

The fifth and sixth heads of objection may be most conveniently considered next in order. They amount to this: that by the clause in question,

(6) 11 Rep. 86.

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1847. not coals or veins of coal were intended, but *mines* of coal only, not then opened; an incorporeal hereditament, not the subject of "Intrusion": and that the term used implies and amounts to a *reservation*, and no more; that the veins of coal, in short, are not excepted from the Grant, but a right only is reserved, of digging for and taking them. It was asked, if coals were excepted, were not all parts of the land required for ways, excepted? In like manner, the stone and timber required for public purposes? Such exceptions would be void for uncertainty; or, if held strictly to be such, what part of the land passed? The Judge's charge was complained of, as tending to confound technical terms. But technical terms, it was insisted, should receive a technical construction. Finally, the proviso at the end of the Grant was referred to, for rendering the whole void, on breach of any of the conditions or provisos; a clause which showed, it was said, that the remedy contemplated was by entry, for condition broken; and so, that an Office was necessary to find such breach. The defendant's counsel cited *Burton's Compendium*, title Mines; *Plowd.* 339, 213; 1 *Shep. Touch.* 96, and the title Exception, *passim*; *Com. Dig.* Prerog. D. 73; *Earl of Cardigan v. Armitage* (7); *Co. Lit.* 47. b and 54; *Norway v. Rowe* (8); *Seaman v. Vaudrey*, (9); and *Doe v. Wood* (10). It was answered for the Crown, that the word "mine" was susceptible of two meanings; the adoption of either of which, was to be determined by the nature of the thing: that might mean certainly a mere right; but it meant also, or might equally mean, the soil; that in *Sheppard's Touchstone*, the word was, in some cases, used indifferently, in each sense; and that here, the whole of the proviso being taken together, it was plain an exception was intended

To the questions asked by the defendant's counsel, respecting the extensive and widely ranging terms, in which the Crown had couched its various reservations, it may be difficult to give a satisfactory reply. But the points to be determined by us, are independent of them. We have to say, merely, whether veins of coal are excepted from the grant; and we think that they are. By that instrument the Crown granted certain land; reserving to itself, however, all mines of coals and the right of searching for, and digging, and carrying away the same. What can this reasonably be understood to mean, but that all *strata of coal* were reserved; whether then dug into or not? If then opened, the reserved mines need not have been searched for; nor need power have been

(7) 2 B. & C. 197, 205.

(8) 19 Ves. 156.

(9) 16 Ves. 390.

[(10) 2 B. & Ald. 738.

reserved, to dig into as well as search for them. And "coal hidden in the earth and not open," is expressly mentioned in *Co. Lit.* (53 b.) as a mine. Then, as to their being *excepted*. The veins and strata of coal formed part of the land, and were clearly not meant to be granted. The word "reserving" is, no doubt the only term of exclusion used; but it is where the sense requires it, and an apt word for that purpose. *Co. Lit.* 143a. 1 *Shep. Touch.*, by Preston, 78. The coal, therefore, never passed to the defendant. It was a part of the land, and severable from the land; and, as a corporeal hereditament, remaining in the Crown, was properly the subject of an information of intrusion. (*Wilkinson v. Proud* (11); *Harris v. Ryding* (12), added judgment of *Parke* b). There was here no Office necessary; for the right is not founded, as was suggested, on the breach of a condition, but on an intrusion into soil, always the property of the Crown.

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The seventh objection, to which much time was devoted on the argument, remains; that the Crown cannot make reservations of this nature: that to do so, is to create a tenure by uncertain services; which is contrary to the statute of 12 Car. II, c. 24, for abolishing all tenures by Knight's service, or other than in free of common socage. It was maintained, that all titles here were *allodial*: the reservation of a quit-rent in grants was commented on, as a tax without authority of Parliament; and certain statutes were referred to, of the reigns of *Henry VIII*, and *Elizabeth*, to show that the power of the Crown to make reservations, even at that time, was doubtful. We need not travel back with the learned counsel, to the middle ages, or the period of the Norman Conquest, to find materials for the disposal of these topics. As to the statutes (35 Hen. VIII, c. 14,—37 Hen. VIII, c. 20,—and 35 Eliz, c. 3,) we have looked into them; and they have no bearing on the question. By the 27 Hen. VIII, c. 28, passed for the more effectual vesting in the Crown of particular monasteries, and other religious houses the king was restrained from granting any of their lands, except under certain reservations. These, or rather the tenure of Knights' service, with which they are accompanied, being found oppressive, the 35 Hen. VIII, was passed to enable the Crown to release them. By the 37 Hen. VIII, further relaxations were introduced, by abolishing, in certain cases, the tenure of Knights' service and its incidents, and converting the estates into tenures in socage, by the service of fealty only. The 35 Eliz. contains no provision, respecting either tenures or reservations, but was passed merely for confirmation of

1847. the Crown's title, and that of its grantees, notwithstanding defects in
 ATTORNEY- surrenders, or the King's want of possession, prior to the grants. With
 GENERAL the reservation of a quit-rent, we have in this case nothing to do. It
 v. may be valid or void, or its appropriation misconceived and illegal
 BROWN. without touching the questions at issue. If it be a service, it is at all
 Stephen C.J. events a *certain* service; and there is nothing inconsistent, in any
 degree, with such a service, and the tenure of free and common socage.
 Then as to the enjoyment of land here being allodial; and, therefore,
 that nothing can be reserved. There are two answers to this, and they
 have already been given. First, the title to lands in this colony is in
 the Crown; equally on constitutional principles, as by the adaption of
 the feudal fiction. Such a title, on either ground, is fatal to the idea
 of the *allodium*. Whether the term implies a property acquired by lot,
 or a conquest, or one left in the occupation of the ancient owners, (that
 is, of the aboriginal inhabitants, see *Steph. Com.* title Tenures, and the
 authorities there cited,) it equally rejects the supposition of a title, in
 or from the Sovereign. The objection, therefore, is only another mode
 of disputing that title. We understood the defendant's counsel, indeed,
 to admit,—though in this we may have been mistaken,—that there
 might be the reservation in a Grant, of fealty, though of nothing else.
 Fealty, however, is a service, and necessarily implies tenure: whereas,
 to enjoy allodially is to hold of no one. But, secondly, the objection
 fails, because here, (as to the matter in question,) there was no reser-
 vation, but simply a thing excluded. A rent is necessarily a thing
 reserved; so is any service to be rendered; so is a right of way. So
 would be the right, unquestionably, of taking the produce of a granted
 mine. But in this case no mine was granted. Instead of granting the
 land, and all that was under the land, the Queen granted the surface
 only, and not the coals which were under the surface. All that the
 defendant had, therefore, he might have enjoyed allodially, and the
 objection as to tenure is at an end.

Let us consider then, what difference is made in this respect, by the
 statute of *Charles*. It is agreed on all hands, that tenures of the Crown
in capite, (notwithstanding the introduction of those words, as Mr
Hargrave says by mistake, *Co. Lit.* 108, a 5) were not abolished; but
 only the tenure by Knight's service, and the various exactions, and
 uncertain services, which attended that tenure. All tenures, thencefor-
 ward, were converted into free and common socage tenure. But this
 may be of the Crown, as the statute itself shows; and it is then, neces-
 sarily, a holding *in capite* of the Crown. And that it may and does exist,
 with reservations, such as of fealty and rent, or fealty and honorary

or other services, (provided they were certain and defined) is a position which scarcely requires a reference to sustain it. (*Wright's Tenures*, 160; *Litt.* s. 117, 118, and 1 *Steph. Com.* 173, 192, 198.) We must frankly say, however, that to such reservations as those which we have been considering in this case, the statute of 12 Car. II appears to us to have no manner of application. What resemblance exists, between services to be rendered by a grantee, in return for land granted, and things simply omitted to be granted, but retained for himself by the grantor, we have been quite unable to discover. Every service, certain or uncertain, must be something the property of the tenant, rendered by the tenant. But the coals, and timber, and ways, mentioned in the Grant in this case, are simply matters *withheld*; and not only is the tenant not required to render them, but (as to the coals, at least), they have never been his property to render.

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Two other points were mentioned for the defendant, though not much insisted on, which it may perhaps be right to notice. One was, that the Crown cannot have base mines, in a subject's land. If it was meant by this, that the Crown cannot except (or in other words, omit to grant) base mines, it is a position repugnant to reason, and unsupported by any authority. There is a passage, indeed, cited in *Vin. Ab. Prerog. R.*, from *Jenk.* 277 pl. 99, which it might seem at first to go that length. The expression is, that the Crown "can have no other mines" in the lands of a subject, than of gold or silver. But it is clear, from the context, that this means only "*by prerogative*." And the case of the *Stannaries* shows (13) that anciently the King had all the tin mines in Cornwall and Devon, to whomsoever the land belonged. The other point respects, merely, the damages. The objection is, that the information does not claim any damages; and that, therefore, there can be no judgment for them. The answer is, that if so, the *Attorney-General* may remit the damages on the record; and the only judgment against the defendant will then be *quod vincatur*. It would seem, however, that as an information of intrusion resembles an action of trespass, damages are recoverable (at least, where things valuable are taken away, see *Vin. Ab. Prerog. sub-title* Intrusion) whether in form demanded or not—*ibid*; and *Ch. Prer.* 334, *Com. Dig. Prerog. D.* 77.

We have thought it a duty to go thus fully into the question raised in this case. My colleagues and myself have certainly spared no pains to arrive at a sound and just conclusion on them; and our unanimous judgment is, on all of them for the Crown. The defendant's rule for a new trial will therefore be discharged.

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RODD v. CAMPBELL. (1)

July 31.

Stephen C. J.
Dickinson J.
and
Therry J.

Dividing Fences—9 Geo. IV., No. 12—Mortgagor, owner within the Act

Notice having been given under the Fences Act, 9 Geo. IV, No. 12, by the plaintiff, to one P., the owner of an adjoining property, mortgaged to the defendant, to erect a dividing fence, and not complied with, the fence was erected by the plaintiff. *Held*, that P., the mortgagor, was *owner* within the meaning of the Act, and that the defendant, although as mortgagee technically owner, was not liable.

SPECIAL CASE on points reserved by the Commissioner of the Court Requests. The action had been brought under 9 Geo. IV, No 12, to recover a sum of money alleged to be due for the erection of a dividing fence. The Act authorised "the owner or owners of lands adjoining or abutting upon any other lands, and having no sufficient dividing fence, to require by writing under his, her or their hand or hands, the owner or owners, person or persons legally possessed of and holding any adjoining lands, &c., to make or repair any or all the dividing fences, &c.," to the extent of one-half, and in the event of a neglect to do so, to complete the whole himself, and to recover a moiety of the expense from the said adjoining owner. The plaintiff in this suit, who held the estate of Bankdown, had given notice to Mr. John Piper, the person then in possession of Holloway Bank, an adjoining estate, and the latter not having taken any step for the erection of a fence, the plaintiff had erected it himself, and now sought to recover a moiety of the expense. The defendant, who was the mortgagee, was absent from the colony when the notice was served upon Mr. Piper, as mortgagor in possession; but, upon the subsequent insolvency of the latter, the defendant took possession, and had since disposed of the land to a Mr. Suttor. The points reserved by the Commissioner were, whether the service of notice on the mortgagor in possession could be deemed sufficient, and whether the defendant as mortgagee could be considered as owner of the land for the purposes of the Act. The verdict was for the plaintiff for £20 9s., subject to the decision of the Court on the points reserved.

(1) *The Sydney Morning Herald*, Aug. 1, 1846.

Michie, for the plaintiff. The mortgagor in possession is but tenant-at-will, and notice on such must be sufficient. The defendant is estopped from denying his liabilities because he sold to *Sutton* at a valuation, which included the improvements.

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Foster, for the defendant, was not called on.

THE COURT was of opinion that the defendant was not legally the owner within the meaning of the Act referred to. The notice had been served upon the mortgagor in possession, as a notice to himself, and as he was the person beneficially interested at the time, it was to him that the plaintiff must look. The defendant, as the mortgagee, although technically speaking the owner of the estate, was not the real owner of it, so as to be beneficially interested in the improvement proposed to be effected; for the equity of redemption remained in the mortgagor, who might at any time have paid off the money secured, and resumed possession; although the defendant afterwards became the absolute owner of the property, that in fact would not render him more liable to pay a portion of the previous expenditure.

Judgment for the defendant.

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LYONS v. ELYARD. (1)

Aug. 6.

Stephen C. J.
Dickinson J.
and
Therry J.

Trover—Arrest of Vessel by Marshall—Plea “not Possessed”—Conversion.

The arrest of a vessel by an officer of the Vice-Admiralty Court, where there is a concurrent possession by the owner, is not a conversion.

In an action of trover against the Marshall for the above arrest, *held*, that notwithstanding there was no conversion, the plaintiff was entitled to a verdict, with nominal damages, on the issues arising from the special plea of justification and the plea of “not possessed,” no evidence having been given by the defendant on the point.

THIS was an action of trover, which had been tried before the *Chief Justice*, on which occasion there was a general verdict for the defendant, and the plaintiff now applied for a new trial. The trespass complained of was the taking possession and retention by the defendant of the whaling barque *Jane*, which was the property of the former. The seizure had been made by the defendant as Marshall of the Vice-Admiralty Court, and a bailiff remained on board the vessel upon his behalf up to the time of her leaving the port. During the whole of this time, however, the plaintiff had exercised his right of ownership over the vessel, so far as to put her in repair and prepare her for sea, and the ship was sent to sea despite the protest made by the bailiff, who was carried away in her as far as the Heads. The defendant had justified the retention of the vessel upon the ground that he had acted by lawful authority, &c.

On the close of the plaintiff's case, it was held by the *Chief Justice*, after argument, that the plaintiff must be nonsuited, inasmuch as there was no evidence of conversion to go to the jury. The plaintiff's counsel refused to be nonsuited, and the jury on his Honor's direction found a verdict for the defendant.

The principal grounds of the present application were, first, that there ought to have been a verdict for the plaintiff on the issue arising out of the plea of justification, inasmuch as this issue lay upon the defendant, who had given no evidence upon it, and second, that there was evidence of conversion.

Foster and Darvall for the plaintiff.

Windeyer and Broadhurst for the defendant.

(1) *The Sydney Morning Herald*, Aug. 7, 1846.

THE COURT was of opinion that the verdict must be sustained. The arrest of the vessel by an officer of the Vice-Admiralty Court was not strictly a conversion; a conversion being a taking of the plaintiff's property, and an appropriation of that property to the use of the defendant. There could be no conversion where there was a concurrent possession in the plaintiff, as there had been in the present case, for there had been no taking of the ship inconsistent with the owner's right of possession, but a mere assertion of the defendant's right or that of his agent to remain on board until certain fees were paid, or some other condition was complied with. Upon the issues which arose from the special plea and the plea of not possessed, a verdict must, however, be entered for the plaintiff with nominal damages.

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Order accordingly.

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HATFIELD v. ALFORD. (1)

Oct. 26. *Estoppel—Denial of lessor's title by lessee—Paramount title—Eviction of lessee—Collusion—Presumption in favour of the Crown grant—Statutes of Limitations—21 Jac. I, c. 16—3 and 4 Will. IV. c. 27—21 Jac. I, c. 14.*
 Stephen C.J.
 Dickinson J.
 and
 Therry J.

The defendant, having been in possession of certain land since 1821, in January, 1844, leased it to the plaintiff; a grant from the Crown of the same land had, however, issued to one S. L. in 1831. The plaintiff being threatened with eviction by J. L., heir of S. L., the grantee, accepted a lease of the premises from J. L. in October, 1844, and, on the defendant distraining for rent, replevied his goods, on which the defendant avowed and the plaintiff pleaded *non-tenuit*. On a motion for a new trial, the verdict having been for the plaintiff, *held*,—

The plaintiff was not estopped from denying his tenancy under the defendant.

A tenant cannot deny that the person by whom he was let into possession had title at that time, unless by a plea averring an eviction by title paramount. A tenant may not show that his lessor's title is determined, unless the plea discloses a similar eviction in consequence of that determination.

The tenant need not prove an actual eviction by legal process or otherwise, provided his new holding be *bonâ fide*, and there be no collusion.

Bare possession in a subject cannot, as against the Crown, with respect to lands in this colony, be taken to afford any presumption of title. The ten years possession of the defendant would not have been sufficient to exempt him from *pleading his title specially* on intrusion brought, even under 21 Jac. I c. 14 (but, *semble*, this statute is not in force here).

The defendant could derive no benefit from his twenty-three years possession under 3 and 4 Will. IV c. 27, since the Crown was not bound by the statute, and the first ten years' possession was therefore inoperative.

The making of a grant raises a presumption in favour of the Crown.

MOTION for a new trial. The facts and argument are shortly set out in the judgment of the *Chief Justice*, and more fully in that of His Honor, Mr. Justice *Dickinson*.

Windeyer, for the plaintiff.

Foster, for the defendant.

The judgment of the Court was delivered separately as follows:—

THE CHIEF JUSTICE. This was an action of replevin, tried before His Honor Mr. Justice *Dickinson* in November last. The defendant avowed, in the usual form, as landlord of the plaintiff, for rent in arrear, and to this the plaintiff pleaded *non tenuit*, in other words, a denial of the holding or enjoyment under the defendant, alleged by him.

(1) *The Sydney Morning Herald*, October 27th, 1846. Cited 2 S.C.R., App. 4; and 3 S.C.R. 24.

At the trial, the facts (stated shortly) appeared to be the following : The plaintiff was let into possession of the land, unquestionably by the defendant, and enjoyed it as the latter's tenant, without dispute, for some months. At the expiration of that time, however (the term of lease from the defendant still subsisting), one *John Levey* claimed the land as heir of *Solomon Levey*, to whom it had been granted in 1831 by the Crown, put in a distress on the plaintiff as for rent due to himself. Rent was then in fact due under the lease from *Alford*, for the amount of which the latter also had distrained. In this state of things the plaintiff quitted the farm for the purpose of seeing *Levey*, of whose claim (though not, so far as I collect from the plaintiff), the defendant had notice. He was absent two days ; during which, it seems, he came to some arrangement with *Levey*, recognising the latter's title. In fact, the plaintiff had in the interval accepted from *Levey* a lease for another term and at a lower rent. On his return, the plaintiff paid the defendant the rent due up to that date, and henceforward it is certain that he considered himself tenant to *Levey* only. On the next quarter falling due, however, under the original demise, the defendant distrained, and for the purpose of trying his right to make that distress, under the circumstances, the present action was brought. The jury, after a direction from the judge, to which I shall presently address myself, found for the plaintiff.

It will be unnecessary for me, in this place, to state the facts more fully, because they are connectedly detailed in the judgment of my learned colleague, which I have requested him to deliver, and by which I shall be followed. Neither do I conceive it to be necessary to enter into a particular examination of the numerous cases, which the industry of the defendant's counsel, Mr. *Fisher*, in his very able argument last term, on moving for a new trial, submitted to us. I think it sufficient to notice some of these cases merely. At the time of the argument, I must confess that I was of opinion with the defendant. I certainly then thought that on the main point in contest the direction complained of was mistaken, and that, as there was no evidence of an actual eviction, the verdict was wrong. The direction was, in substance, that actual eviction was not necessary ; but that if there was a better title in *Levey*, which he could have enforced by ejectment, a *threat* of eviction made without collusion, and *bond fide* submitted to by a new holding, was sufficient. That proposition appears, at first sight, a startling one ; but mature reflection, and a careful examination of the authorities, have satisfied me that it is correct. Whether a better title existed, which could have been so enforced, and whether there was collusion, are

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1846. independent questions. But supposing the decision of them to be with
 HATFIELD the plaintiff, I am of opinion, first, that the facts here were properly
 v. received in evidence on the issue taken; and, secondly, that they
 ALFORD. constituted a sufficient answer to the action, in point of law.
 Stephen C.J.

The question on that issue is (not in this case only, but in every other where *non tennit* is pleaded), whether the plaintiff held and enjoyed the land during the period in respect of which the distress was made, as tenant to the defendant. If the plaintiff can show that he did not so hold or enjoy, and was not prevented by any act or omission of his own from so enjoying, and if he *does* show those facts, the issue must be found for him. But, in some cases (and, indeed, such is the general rule), where the plaintiff has come in under the defendant, he is not permitted to deny that he did so hold or enjoy. Where he has entered on the land, as tenant to the defendant, and continued to enjoy it, or has continued in a position to enjoy it, but for his own act or default, he is estopped from asserting that he enjoyed or held otherwise than such tenant. The question is, however, one of *estoppel*; not of pleading. In every case where the plaintiff in replevin *may* deny his tenancy, he does so most naturally, as it seems to me, under this form of issue; and I can discover no reason for a resort to any other. We come then to the question, whether the plaintiff is estopped from denying his continued holding in a case of this kind. Now, there is no authority, among the many cited—certainly no distinct or clear authority—for so determining. It will be found, in every case in which the original landlord's right prevailed, either that the tenant continued in fact to enjoy under the first holding, or in consequence of such holding, or that he might have continued so to enjoy but for his own default. There is no case in which a party who has ceased to enjoy under or by reason of his original holding, without any act or default of his own, has been estopped from exposing his landlord's title, whether he has been evicted or not. If such a case exist, at least it has not been cited; nor have any of us been able to discover it. If there be collusion, that is an act or default of the tenant, within the terms of the rule stated; if there be no *bona fide* adverse claim, enforced or sought to be enforced, or there be no new holding thereupon under the claimant, the tenant will be taken to continue on his first holding, or to enjoy in consequence of that holding. If the title of the new landlord be defective, the tenant submits to it at his peril. In that case he might have continued to enjoy, and he may fairly be considered to have enjoyed, under his first landlord. But if an adverse and enforceable claim be made, and of necessity submitted to, and a new

holding thereupon be entered on, I find no authority which decides (though there are strong expressions in some of the cases having that tendency) that the tenant shall nevertheless be bound to his first holding; and I will add, I think there would be great injustice in such a decision.

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It was insisted that, where a landlord's title was sought to be impeached, at and from its commencement, there must at least be actual eviction. Let us then examine the cases. Now, *Doe v. Barton* (2), was not the case of an eviction, but of a lease by a mortgagor, after the mortgage, and demand by the mortgagee, acquiesced in by the tenant, to pay the rent to him. There was no new lease; but a determination of the first landlord's right, by notice from the mortgagee. The action was by a second mortgagee, whose title had been acknowledged by the tenant, in ignorance of the prior mortgagee, and who had let a portion of the premises, himself, to one of the defendants: and the Court held that each tenant was at liberty to show those facts in answer to the action. It was certainly considered, in that case, that the landlord's title *at the time of the letting*, was not disputed by such a defence, but that the facts were admissible, merely, to show its nature and extent. And a doubt was expressed whether they could have been received, on behalf of the mortgagor's tenant, in answer to an ejectment against him, by the mortgagor himself. The case, however, as I have observed, was not one of eviction. The tenants held, if not under their former tenancy, yet in pursuance of it. But the Court thought it absurd in such a case, to require from the mortgagee, the only person really having title, the form of a previous ejectment. In *Gouldsworth v. Knights* (3), the Court of Exchequer acquiesce in that view of the matter, by observing that the notice from the first mortgagee was *equivalent* to eviction. In the last-mentioned case, however, the tenant continued to enjoy under or in consequence of his first holding, and on that principle, as I conceive, he was not permitted to show, that the persons to whom he owed that enjoyment had no title. On the same principle *nil habuit in tenementis* is no plea, to an action for use and occupation, *Curtis v. Spitty* (4). The decision in *Doe d. Knight v. Smythe* (5), that a tenant cannot, by disclaiming his landlord, enable another to assume that character, so as to entitle the latter to defend an ejectment, brought against him by that landlord, appears to me to rest on the same principle. It was there said, that neither the tenant,

(2) 11 A. & E. 312.

(3) 11 M. & W. 343.

(4) 1 Bing. N.C. 17.

(5) 4 M. & S. 347.

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nor any one claiming by him, can controvert his landlord's title, and that he cannot put another person in possession, but must deliver up the premises to the landlord from whom he took them. All these positions may be conceded. In that case, the tenant remained in possession, and enjoyed it, notwithstanding his disclaimer, under the landlord who put him there. No eviction, no threat, no demand was shown, but he appears voluntarily to have elected a new landlord, without even a new holding. He might have restored the possession to his landlord, and he did not. The decision is therefore intelligible; but the case is no authority for holding that a tenant who has not that opportunity is therefore without remedy. Yet the argument amounts to this, or nothing. A tenant must submit to an abandonment of his home, or to have it rendered useless by repeated entries and intrusions by the party really entitled, rather than accept the security of a title opposed to that of the person by whom he has been deceived. It was admitted, that actual eviction may be an answer, and in *Hopcraft v. Keys* (6) actual eviction certainly was shown. But what is the principle of the decision in that case? I conceive it to be, that the tenant there was not in possession, either under his first holding, or in consequence of it, and neither enjoyed, nor could by any act of his have enjoyed, under that holding. Where there is collusion, this cannot be truly asserted. The tenant who voluntarily renounces his landlord, can scarcely be said to have done no act precluding himself from enjoying as his tenant. But a tenant is not bound to *contest* a right of entry, as the case last cited shows, and one of the Judges expressly says. If so, what difference on principle is there, between the owners actually entering and evicting, and his entering, with lawful right so to do, and threatening to evict? I conceive that, substantially, there is no difference. I confess, indeed, that I discover no substantial difference (nothing beyond a technicality) between a tenant's showing the expiry of his landlord's title, and that his landlord never had a title. In *Hopcraft's case*, the decision is put on the former ground. But, substantially, the landlord never had any title. He was in possession, under a building agreement merely. He was to have a lease, after completion of the houses; but they never were completed by him; and, therefore, after a stipulated period of six months, the owner entered. According to that case, therefore, no greater interest in the landlord need be admitted, than lawful possession merely. All beyond seems controvertible, as matter of expired title. I need not enter, however, into that point; but will pass on to other cases. As to *Doe v. Baytup*

(7) the only point there was, whether a person who gets possession by license from a tenant, can dispute that tenant's right to possession. It was held that he could not; but that he was himself in the position of a tenant to such tenant. The defendant in that case actually enjoyed, under the party whose title he sought to impeach. In *Doe v. Mills* (8) the tenant voluntarily renounced his landlord, and gave up possession to the defendant for a sum of money. If this tenant therefore did not enjoy, it was his own default. He was consequently estopped, on the principle which I have explained, from denying that he held under that landlord, and the person whom he brought in could stand in no better position. But the question is what would have been the position of the tenant, under different circumstances; and especially had his possession been actually intruded on, by a person shown to be the true owner, and manifesting plainly a design to evict him, with power to carry out that design? In *Balls v. Westwood* (9) the same principle appears as in the last case. The landlord's title was shown to have expired, and the tenant had paid rent to the new owner. But there had been no attempt to evict, and there was no new holding. It was not permitted to the tenant, therefore, to say that he did not hold of the landlord under whom he came into possession. In *Hall v. Butler* (10) the tenant held under one *Nevitt*, who, it was admitted, had no title. *Nevitt*, believing the defendant to be entitled, so informs the tenant, who then agrees to accept the defendant as landlord. The tenant afterwards pays rent, in fact, to the defendant; and it was held that, under such circumstances, he could not show title in another. The principle there applies:—There was an enjoyment, either under the holding from the defendant, or in consequence of that holding. There was, as was observed by *Patterson, J.*, *no evidence of any attempt to eject him*. He clearly, therefore, could not dispute the title under which he entered. In *Taylor v. Zamira* (11) the tenant was allowed to show that his landlord had no title, although there was no eviction. The land was charged with an annuity, by a deed long anterior to any title in the landlord. That annuity being in arrear, the tenant was threatened with a distress if he did not pay it. He accordingly did pay it, and the Court held such payment under the threat to be an answer to the landlord's claim for rent. That case tends strongly to show, that where the tenant does not collude, he may recognise a title adverse to that of his landlord; and that eviction, or legal process, is not a preliminary to the exercise of that privilege. But, if the landlord's title to his rent may be defeated by an enforceable threat

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(7) 3 A. & E. 190. (8) 2 A. & E. 20. (9) 2 Camp. 11.
(10) 10 A. & E. 204. (11) 6 Taunt. 524

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of distress under a title paramount, why may not a similar threat of eviction, or an actual entry, evidently with intent to evict, or to compel submission, under title paramount, equally defeat that title?

My opinion is, on the best consideration which I can give this question (certainly one of much difficulty), that such a threat or entry by a party having title will defeat the landlord. The impolicy of such a decision has been strongly urged. But, guarded as the terms are which I have used, I do not think it open to that objection. Collusion is excluded; so are cases of defective title in the claimant; so are gratuitous disclaimers of the holding, and voluntary surrenders of the possession. The hope of escaping a tenancy is excluded, for there must be a *bona fide* new holding. Where all these conditions are satisfied, I can conceive no reason why the tenant should not be protected by law in his possession. To abandon it to his landlord, or submit to the certainty of being ejected by legal process, might be ruin. But resistance might as effectually ruin him without legal process. The party entitled might enter upon him, and cut down his fences, or consume his produce, and he would be without remedy. If he brought trespass, his lease would not protect him; the real owner could plead that the property was his own freehold, or that he was otherwise entitled to possession. On the other hand, if he gave up the property to his landlord, he might have to forego years of labour, and would at least abandon his home, with perhaps no prospect of compensation.

I see nothing in this case, which would have justified a direction to the jury, to find collusion. It might possibly have been suspected, that there was collusion, but the jury were instructed to consider, as I understand, whether collusion was proved, and they must be taken to have found that it was not.

The remaining question is, whether the title which the plaintiff in this case recognised, was a valid one, and enforceable by law. I am of opinion that it was. *John Levey*, the claimant of that title, was proved to be the eldest son of *Solomon Levey*, to whom the Crown granted the property in 1831. Now we require no evidence to enable us to say, because this Court takes judicial notice of the fact, that the Crown was the legal owner of all land in this Colony at the time of its first settlement in 1788. We must presume the Crown, therefore (in the absence of all evidence, or suggestion, of any previous grant of the property), to have been at the date of its grant to *Levey*, the legal owner of this particular land. In fact, no question was made as to this; nor was it disputed, that a valid title was conveyed by that grant, from the Crown

to *Levey*. But, it having been shown that, at the time of the latter's claim, which was in 1844, there had been a possession in fact in other parties (that is in *Alford* or his father), for twenty-three years, it was contended that *Levey* could not have maintained an ejectment. The Judge ruled, however, that no adverse possession could be effectual against *Levey*, or those claiming under him, except such as occurred after the date of the grant, since which the possession had extended over a period of thirteen years only. His Honor further said, that a title must be presumed to have been in the Crown, at the time of the making of that grant. I am of opinion that the Judge was right, on both points. As to the latter, I think it sufficient to say, that bare possession in a subject cannot, I conceive, as against the Crown, with respect to lands in this Colony, be taken to afford any presumption of title, if for no other reason than the peculiar character of titles in New South Wales, which are all derived from the Crown, and at periods of which the longest is comparatively recent, and necessarily within sixty years. But it seems plain, from the nature of the ordinary Crown remedy, in respect of lands claimed for the Crown, that no title is presumed against the Crown from possession merely. Upon an information of intrusion (unless the Crown shall have been twenty years out of possession), the subject must show his title specially, and that on the record. He cannot rely on his possession, and put the Crown to show title. (See the cases, in *Ch. Prerog.* 333). And it is laid down, generally, that as against the Crown the subject must show title in all cases, and cannot rely on possession merely. (*Ibid.* and pages 353, 357. Also, *Stanuf. Prer.* 63 a). Had the Crown been twenty years out of possession, instead of ten only, the statute 21 Jac. I, c. 14 (supposing it to be in force in this Colony, which I am strongly inclined to think it is not), would so far have effected an alteration, that it would then have been unnecessary for the defendant, on intrusion brought, to plead his title specially, but, without showing it on the record, as in ordinary cases he must do, he would be entitled to retain possession till the title was found for the Crown. It would seem also, *Attorney-General v. Parsons* (12), that the rules of evidence are, in that case, the same as between subjects, and that the onus of proving title is then cast on the Crown. Supposing the Crown, however, as to that matter, to be in such cases in the position of an ordinary plaintiff, yet it is not easy to see how the defendant's possession could, practically, effect any change. The Crown could not, after all, in effect, be made to prove its title; since that title rests, in this Colony, on matter of judicial cognizance. It might perhaps be put to show, to be sure, that

(12) 2 M. & W. 25.

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1846. there was no record of any grant of the land in question; but that would
 HATFIELD scarcely help the defendant. It is not necessary for me, however, con-
 v. sidering the view which I take on this part of the case, to go more fully
 ALFORD. into the question, or to express any opinion as to the supposed effect of
 Stephen C.J. the decision in *Doe v. Morris* (13), with respect to the mode, or time, of
 finding or trying the title of the Crown, after twenty years non-possession. The last mentioned point, in fact (independently of any reasoning on the subject), seems to be set quite at rest by the *Attorney-General v. Parsons*, already cited.

I think it clear, then, that the ten years' possession in *Alford's* family, before the grant, afforded no presumption of title against the Crown, and one question only remains: whether the entire period of twenty-three years' possession would have barred *Levey's* ejectment, supposing him to have brought one. That question depends solely, I apprehend, on the applicability to this case of the first portion of s. 2 of the Statute of Limitations, 3 and 4 Will. IV, c. 27. And I think that provision wholly inapplicable to it; first, from the reason of the thing; and secondly, because of the terms of the enactment. I assume that the possession in the *Alford* family during the first ten years (though that fact does not clearly appear), was adverse to the Crown. But, taking it to be so, I think that it is not possible to read the Act, especially its three first sections, and considering them in connection with this case, to suppose that they could really be construed as applying to it. The colonists of New South Wales hold lands under the Crown only, granted at intervals ranging over a period of fifty-eight years: the colony being of immense extent, these lands lie at very great distances from each other and from the seat of Government. It may be supposed, therefore, that in a vast number of instances, many tracts or spots have been occupied without authority or even the knowledge of the Crown servants. They are from time to time granted to individuals, and it is gravely contended that the Statute of Limitations extends to such cases, and if actions of ejectment be not brought within twenty years (not *after the grant*, but) after the *first time of occupancy*, the grantee's title is gone. The words of the statute, however, in my opinion, exclude such a construction. The words of s. 2, are, within twenty years next after the time, at which the right shall have *first accrued, to some person through whom the plaintiff claims*. Can this be supposed in this colony to mean or include the Crown? When would such a right (the right of making an entry or bringing an action to

recover the land), be said to have *first accrued* to it? But the language and nature of the provisions in sections 1 and 3 of the Act, show that the Crown is not included. The definitions of the word *person*, in the former, exclude the Crown; and the whole tenor and scope of the third, showing that individuals (but including in that term public and private bodies other than the sovereign), and estates in the hands of individuals, and passing from one private hand to another, were in contemplation, equally excluded from the Crown. If, indeed, the word *person* includes the Crown, as the party *through whom* a man claims, it must surely include the Crown when the party *claiming*, and then we have (under the concluding portion of s. 2) the term of twenty years limited to the Crown to bring its own actions, which it would never be pretended is the law.

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On the whole, therefore, I think the Judge's directions and the verdict right, and as the other members of the Court concur in that opinion, the rule for granting a new trial is discharged.

I would remark that in this case, in which the rent at stake is no more than £5 per annum, and the sum recovered is 1s. only, some of the most difficult and important questions of law have arisen, and been at a great expenditure of time and labour considered by us, that have probably ever been presented to a Court of Justice for decision.

DICKINSON, J. In compliance with the desire of the *Chief Justice*, I proceed to deliver the judgment which in the anticipation of a difference on the Bench, I had prepared as the expression of my own opinion upon this case. It appears to me that we all concur not only in the result but (at least on the point principally argued) substantially in the reasons by which we have severally arrived at the same conclusion. But as our reasonings are presented in different shapes, it may be satisfactory to the parties to be informed of our respective views. The *Chief Justice* has given an outline of the facts; but as a basis for my own observations I will commence by detailing at length the circumstances disclosed in evidence upon the trial of the cause.

By a memorandum of agreement between the defendant and the plaintiff, dated 1st January, 1844, the defendant demised the land to the plaintiff for three years for £10, and the plaintiff agreed to re-deliver it to the defendant at the end of that period. The plaintiff entered into the occupation, and his rent being in arrear, the defendant by his bailiff, distrained for it on the 23rd October, 1844. While the defendant's bailiff was in possession under that distress, one *John Levey*

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also put a bailiff on the land, who stated that the same was claimed by his employer. Of this claim the defendant had notice. On the occasion of that distress, the plaintiff went away to Sydney to see *Levey*, and on his return, (viz., on the 26th October,) paid the rent distrained for by the defendant, in the presence of *Levey's* bailiff.

It moreover appeared in evidence that the defendant's family had been in occupation of the land for many years, and that it had been occupied by the defendant's father in 1821. The death of the defendant's father was not proved. A grant of land from the Crown, of premises corresponding with the land described in the declaration to *Solomon Levey* and his heirs, dated in 1831, the marriage of *Solomon*, the subsequent birth of his eldest son *John*, and the death of *Solomon* were respectively proved. *John Levey* stated, that the action was brought by his direction to try his title, though he at the same time informed the plaintiff that he was himself to pay the costs. The plaintiff proved a memorandum of agreement between himself and *John Levey*, dated the 25th October, 1844, by which the latter demised the land to the plaintiff for five years. The distress for which the action was brought, was levied after the making of the last named agreement.

At the trial *Mr. Fisher* for the defendant, objected—1st, to the reception of any evidence offered by the plaintiff, of *Levey's* title, as he had been let into possession by the defendant, 2nd, that he could not give such matter in evidence under the issue joined. *Mr. Windeyer* for the plaintiff contended, that the facts showed an eviction by *John Levey*, before the distress, and therefore that the plaintiff did not hold of the defendant at the period of that occurrence. I admitted the evidence, and assigned as my reason for so doing, that an eviction showed the plaintiff had not enjoyed that possession under which alone could the estoppel (insisted on by *Mr. Fisher*) arise, and that if an eviction were proved, it followed that the plaintiff did not hold of the defendant, as affirmed in the issue joined.

In summing up, I told the jury, that if before the distress complained of in the declaration the plaintiff had been evicted by title better than the defendants and that the same was not bound by the Statute of Limitation, that the plaintiff at the time of such distress did not hold as tenant to the defendant. That as *Alford*, senior, was in occupation before the making the grant, there was evidence that he was seized in fee of the land in question—but that another presumption arose in favour of the Crown from the fact of the grant being made, which was done at the regular office, and with the usual formalities. That if it was Crown

land, the Statute of Limitation only ran from the execution of the grant in 1831. That to constitute an eviction it was not necessary that the plaintiff should have been actually turned out by legal process or otherwise, but that an eviction would be sufficiently proved if they were satisfied that the defendant, without collusion, yielded up to one who had a right to turn him out: that a threat to distrain or bring an ejectment was equivalent to an eviction. The jury found a verdict for the plaintiff.

A new trial was moved for on the following grounds:—1st. That the evidence should not have been received under the issue joined. 2nd. That the jury should have been directed that there was no evidence of an eviction, or at any rate that it was collusive. 3rdly. That the plaintiff was estopped under the issue from setting up the case he relied on. 4thly. That the jury should have been told that the plaintiff had not proved any facts which authorised him to dispute the defendant's title. 5thly. That the jury should have been told that there was no evidence to show that the defendant was wrongfully in possession of the land when he demised it to the plaintiff. 6thly. That I ought not to have told the jury that there was a presumption in favour of the Crown from the making of the grant. 7thly. That the verdict was against evidence. 8thly. That I ought not to have told the jury that the Statute of Limitation must be reckoned from the time of the grant. 9thly. That the plaintiff failed in making out a title in *John Levey* paramount to that of the defendant.

The motion for the new trial was argued before us last term, by Mr. *Fisher*, for the defendant, and Mr. *Windeyer*, for the plaintiff.

Mr. *Fisher*, in support of his very able argument, cited *Doe v. Lady Smythe* (14); *Doe v. Mills* (15); M. and R. 385 S. C.; *Doe v. Baytup* (16); *Balls v. Westwood* (17); *Doe v. Wiggins* (18); *Hall v. Butler* (19); *Doe v. Barton* (20); *Doe v. Birchmore* (21); 2 *Smith's Leading Cases* 457; *Harrison's Woodfall* 628; *Neave v. Moss* (22); *Parry v. House* (23); *Hopcraft v. Keys* (24); *Jew v. Wood* (25); *Doe v. Morris* (26); *Bac. Abr. Rent (L)*; *Hill v. Saunders* (27).

From these cases Mr. *Fisher* argued with the other points, principally that a tenant can never deny his landlord's title at the time of his demise, or anything which involves such denial, unless he shows also an eviction by judgment of a Court of law in an action of ejectment;

(14) 4 M. and S. 347. (15) 2 A. and E. 17; 1 Moo. and Rob. 385. (16) 2 A. and E. 188. (17) 2 Camp. 19. (18) 4 Q B. 367. (19) 10 A. and E. 204. (20) 11 A. and E. 307. (21) 9 A. and E. 662. (22) 8 Moore 389. (23) Holt 489. (24) 9 Bing. 613. (25) 1 Craig and Ph. 195. (26) 2 Scott 276. (27) 4 B. and C. 529; 2 Bing. 112.

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1846. that the instances in which it has been held that matter equivalent
 HATFIELD to an eviction would suffice, were cases where the plea confessed the
 " lessor's title at the time of the demise, and avoided it by showing
 ALFORD. subsequent expiry of that title; that the plaintiff's case was nothing
 Dickinson J. more than that the defendant *nil habuit in tenementis*, and showed no
 judgment of ejectment; that no title paramount was shown in *John*
Lerey; that there was twenty year's adverse possession on the defend-
 ant's part, as *Lerey* and his heirs had not entered for more than twenty
 years after *John Alford*, the elder, had commenced his occupation.

Mr. *Windeyer*, for the plaintiff, as to the main point, argued that the cases cited by Mr. *Fisher* did not apply, as it appeared that the plaintiff had been evicted. He cited the dictum of *Littledale, J.*, in *Wilson v. Anderton*, (28) at p. 459. "That in an action of covenant by the lessor a plea of eviction by title paramount, or that which is equivalent to it, is a good plea; and a threat to distrain, or bring an ejectment by a person having good title would be equivalent to an actual eviction." And that there was at the trial evidence of such facts as brought the plaintiff's case within the dictum cited.

As to the second and third grounds of objection to my charge to the Jury, two rules are fully established: 1st, That a tenant cannot deny that the person by whom he was let into possession had title at that time—*Litt. sec. 58, Curtis v. Spitty* (29); 2nd, But he may show that such title is determined—*Co. Litt., 45 a*; 2. *Wms. Saund*; 418 (note 1), and judgment of Lord *Denman* in *Doe v. Barton* (30). Each of these rules seems to me subject to a qualification: that in the first, the denial of the lessor's title may be made in a plea averring an eviction by title paramount—*Jordan v. Twells* (31). See judgment of *Gibbs, C.J.*, in *Taylor v. Zamir* (32); in the second, the expiry of the lessor's interest cannot be pleaded, unless the plea discloses a similar eviction in consequence of that determination.

The qualification of the latter rule I do not find propounded specifically as I have put it, but I consider it implied in the judgment of Lord *Ellenborough* in *Balls v. Westwood* (33), and an eviction was undeniably the fact upon which each of the decisions rested in *Wilson v. Anderton*, (34) *Hill v. Saunders*, (35) *Doe v. Barton*, (36) *Hopcraft v. Keys*, (37) *Pope v. Biggs*, (38) which were cases of expiry of interest.

(28) 1 B. & Ad. 450. (29) 1 Bing. N. C. 15. (30) 11 A. & E. 307. (31) *Ca. temp. Hardw.* 171, and in 4 T. R. 619. (32) 6 Taunt. 524. (33) 2 Camp. 11. (34) 1 B. & Ad. 457. (35) 4 B. & C. 529. (36) 11 A. & E. 307. (37) 9 Bing. 613. (38) 9 B. & C. 245.

The qualification suggested to the latter is consistent with that established to the former rule, and is maintainable on the same reason as that by which the former is alone supported.

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The obligation to pay rent and uphold the landlord's title arises only from the tenant's enjoyment under his lessor of the thing demised—if he be deprived of it by better title, the obligation ceases—*Gilbert on Rents*, 145, cited in *Bac. Abr., Rent (L.)*; if, therefore, the tenant has enjoyed the thing demised under his landlord, since the expiry of the latter's title, he ought, upon the same principle, to pay him rent for the latter period. In either case, natural justice equally demands that the tenant should pay his landlord for the benefit he has received from him. If in this case *Levey* could have ejected the plaintiff, and afterwards let to him, the words of Lord *Denman*, in *Doe v. Barton*, (39) seem as applicable to this action as to that, "It seems absurd to require him to go through the form of an ejectment, in order to put him in the very position he now stands."

Dickinson J.

As therefore it appears to me that to each of the two defences an eviction is indispensable, and as circumstances equivalent to it have been adjudged admissible in the latter, I conclude that like transactions should in the former instance be equally receivable.

Having considered most carefully the authorities cited by Mr. *Fisher*, for the defendant, I find neither direction nor decision, that in cases like the present the plaintiff must show an eviction by judgment of ejectment. There is no such allegation in the usual plea of eviction, in *Foster v. Pierson* (39) the defendant to a declaration for breach of covenant for quiet enjoyment, demurred (amongst other things) because *it was not stated that the plaintiff had been evicted by legal process*. The objection was abandoned, *the precedents being against it*. In *Simmons v. Farrer* (40), it was not objected to the eviction there pleaded, that no ejectment by legal process was alleged, but that no sufficient right of entry in the evictor was disclosed. Against that objection it was urged that it was hard to call on the defendant to show the particulars of such right of entry. To this (without suggesting the necessity of legal process), Chief Justice *Tindal* replied, "I am not struck with the argument of hardship in this case; for if the defendant had stood his ground in the ejectment, he would at all events have learned on what authority the entry was made." If an ejectment had been alleged in such a plea, and proved, it would, being *res inter alios acta*, have established no fact

³⁹) 11 A. & E. 315.

(39) 4 T.R. 617.

(40) 1 Bing. N.C., 272.

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against the defendant ; it would not even have disproved collusion, an ejectionment *with*, being as susceptible of contrivance as an eviction *without* legal process.

Dickinson J. I am of opinion, therefore, that I properly directed the jury that the plaintiff *need not prove an actual eviction* by legal process or otherwise.

I am moreover of opinion that I acted rightly in not telling the jury that there was no evidence of an eviction. There was testimony that *Levey* put his bailiff on the land—that the plaintiff went to see *Levey*—that he subsequently took a lease from him and brought this action at his instigation, from which circumstances, I think the jury were not unwarranted in inferring that the plaintiff yielded to *Levey* from the fear of the latter evicting him. The verdict may have been framed with slight, but assuredly not without some materials for its composition.

I am also of opinion that I was correct in not telling the jury that the eviction was collusive. Collusion implies fraud, “which,” according to *Tindal*, C.J., in *Belcher v. Prittie* (41), “upon all occasions, has been said to be solely and peculiarly for the consideration of a jury.” I was not required to direct the jury, to consider whether the eviction was or was not collusive, and I substantially left the question of collusion to the jury in the same manner as was done in *Hopcraft v. Keys* (42).

As to the 4th, 5th, and 6th grounds of objection, I think that a clear title was traced from the Crown to *John Levey*, and that although *Alford*, senior, was proved to have been in possession of the land before the date of the grant, yet the jury (from their knowledge of the country and the reasonable presumption that the Crown, by its sworn officers, in the course of public business, would not bestow a subject's land) were at liberty to conclude that the *Alford* family were unauthorised intruders upon the possessions of the Sovereign. See *Doe v. Roberts* (43).

As to the 8th ground, the evidence went no further than that *Alford*, sen., had been in possession in 1821, *i.e. ten years before the grant in* 1831. Assuming that the possession of the elder *Alford* was adverse to the Crown from and after 1821, then it is an acknowledged doctrine, that the Crown may, by its prerogative, assign a chose in action relating land, see the Judgment of *Tindal*, C.J., in *Doe dem. Watt v. Morris* (44). But a question has been suggested whether the assignment should not be, by special words, instead of by a mere grant of land itself. On

(41) 10 Bing., 414.

(42) 9 Bing., 614.

(43) 13 M. and W., 520.

(44) 2 Bing. N.C., 199.

consideration of the *Marquis of Winchester's case*, 3 Rep., it seems to have no application to this, as there the question arose upon the special wording of an Act of Attainder. This case, moreover, differs from that of *Cromer*, cited in page 4 of 3 Rep., in this respect, that there the Queen had never been in possession, whereas, in this case, the King, at the time of the grant to *Solomon Levey*, never had been out of possession of that land, which, in common with the whole territory, had vested originally in the Crown by discovery and occupancy of part in the name of the whole. The Crown can never be put out of possession by the wrongful entry of a subject, and, therefore, for such entry the Crown does not proceed by ejectment, but by writ of intrusion, which is in the nature of trespass *qu. cl. fr.*, to the maintenance of which possession is essential. If *Alford* had continued adversely possessed in fact, for twenty years and more, then by Statute 21, Jac. I, c. 14, the Crown title would not have been barred, but the burden of proof would (assuming this statute to be in force in this Colony) have been shifted from *Alford* to the Crown in the trial upon its writ of intrusion, *Attorney-General v. Parsons* (45). Were we to hold that the Crown must grant by special words in every case where a subject had wrongly intruded on its domains, there would be imposed on the Crown or its grantee, the trouble of ascertaining, in all cases, whether or not there was a person in wrongful occupation, and the decision would be productive, in such a vast territory as this, of the greatest public inconvenience—and an inconvenience to the public is sufficient to prevent the application of a rule of the common law, however logically the conclusion may follow in abstract reasoning, or however strictly it would be applied in a case which might involve a hardship on an individual.

In 1831, then, there is evidence that the King was in possession of the land. He granted at that time to *Solomon Levey*. *Levey* either then obtained an estate in possession of which he has never yet been dispossessed, though the *Alfords* have continually trespassed on it, or he obtained a right of action against *Alford*, senior. If the latter, he might sue in his own name, or perhaps in the Sovereign's, *Bac. Abr., Prerogative* (F.3.)

If *Levey*, in 1845, could have sued in the Queen's name, then, as she would be the party to the suit for all purposes, *Gibson v. Winter* (46), he would have recovered on proving the Queen's title, notwithstanding a possession in fact by the *Alfords* for more than twenty years.

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(45) 2 M and W., 23.

(46) 5 B. & Ad. 96.

1846. If he sued in his own name, then the statute 21 Jac. I, c. 16, sec. 1, HAYFIELD would not have barred him, as that statute makes the time run against F. the claimant and his heir from the time when the right of entry first ALFORD. descended or accrued to him, and if by the Crown grant a right of entry Dickinson J. accrued to him in 1831, twenty years from that date had in 1845 obviously not elapsed.

Upon this point the only question which remains is, whether the statute 3 and 4 Wm. IV, c. 27, has altered the law in this respect. The Colonial Adopting Act, by section 2, provided that the English statute should take effect from the 1st August, 1837, which date we may substitute in the 2nd section of the Imperial statute for the 31st December, 1833, and therefore the colonial law now is that from the 1st August, 1837, no person shall make entry on or bring an action for land but within twenty years next after the time when the right to do so first accrued to the person through whom he claims. If *John Levey* would have been obliged in October, 1845, to proceed in the Queen's name by information of intrusion, such proceeding would not have been affected by this Statute of Limitation, *Bac. Abr., Prerogative* (E. 5); if he might have proceeded in his own name, another question arises, whether in section 2 the words, "person through whom he claims," include the Sovereign. In the interpretation clause 1 those words are stated to comprise three classes of individuals. The Crown (assuming that it was ever put to its right of entry), I think, is not included in class 1, because that embraces only persons who can hold land in their natural capacity, which the Crown cannot unless in right of its duchy, or an estate tail, *Bac. Abr., Prerogative* (E. 2). The Crown is obviously not included in the second, as Crown lands cannot be escheated. The third class evidently extends to a collection of individuals, and therefore excludes a corporation sole, which the Sovereign may certainly be considered.

I am therefore of opinion that the remedy which *John Levey* had for the recovery of the land was not in 1845 barred by the adopted statute 3 and 4 William IV, c. 27.

The seventh and ninth grounds have been incidentally noticed, and the first, viz., that the plaintiff ought not to have been allowed to make out his case under the issue joined, is obviously untenable. The evidence was that before the distress the plaintiff had been compelled to hold of *Levey*. Consistently with that fact, he could not then be holding of the defendant. The evidence disproved the defendant's allegation, and was, therefore, strictly relevant to the issue. See *Hopcraft*

v. Keys (47) and *Prentice v. Elliott* (48). In fine, I am of opinion that my reception of the evidence and direction to the Jury were severally correct ; that the verdict was not unwarranted by the evidence ; and, therefore, that there ought not to be a new trial of this case.

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THERRY, J. As Mr. Justice *Dickinson* has intimated that it was the intention of the members of the Court to deliver separate opinions, I may say that intention was entertained when a difference of opinion subsisted on the Bench, and in anticipation of its continuance ; but as subsequent conferences have led to an unanimous result, the same necessity does not exist as if such difference had continued. For the reasons (substantially at least) that have been stated, and on the authority of the cases so fully cited, I have arrived at the same conclusion with the other members of the Court ; and as, I confess, I cannot present the case in any new point of view, I deem it requisite only to express my simple concurrence. I may add that from the commencement the members of the Court agreed on all the points except as to the meaning of actual eviction.

I should wish further to guard against the supposition that by the present judgment it is determined that the 21 Jac. I, c. 14, is applicable to this colony. I consider the present question to be decided on grounds quite irrespective of the question of the applicability of that statute.

Rule discharged.

(47) 9 Bing. 613. (48) 5 M. & W. 606.

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Ex parte GAUNSON. (1)

Nov. 9.
Stephen C. J.
Dickinson J.
and
Therry J.

Quo warranto—Information in the nature of—Affidavits in support—9 Geo. IV, c. 83, sec. 6.

An application for an information in the nature of *quo warranto* must be granted if the relator show sufficient grounds to require a further investigation.

In support of a motion to make the rule absolute new affidavits may be read provided they are merely confirmatory of the facts already alleged.

In this matter a rule *nisi* had been obtained by Mr. *Lowe*, on Nov. 5, upon the affidavit of Mr. F. *Gaunson*, calling upon *Daniel Egan*, who had been recently elected as a City Councillor for Gipps Ward, to show cause why an information in the nature of a writ of *quo warranto* should not be filed against him, in order to prevent his serving in the said City Council. The application was based upon the 49th section of the Act of Incorporation, which declared among other things that no person having a contract with the Corporation should be eligible for election. From the affidavit of Mr. *James Martin*, the applicant's attorney, it appeared that Mr. *Egan* had leased or farmed the revenue of the fountain at Soldier's Point for £40 per annum, and that the Mayor having been applied to for further information on this point, had declined affording it, upon the ground that it would not be decorous to afford information to be used against anyone who had been elected a member of the Council.

The application was therefore coupled with an application for an order upon the civic authorities to afford the necessary information, which was also granted.

Lowe moved that the rule be made absolute. He proposed to read a new affidavit in support.

Foster who appeared to show cause, objected.

Lowe cited *Rex. v. Newling* (2). The affidavit was based on the information obtained under the order of the Court for allowing the solicitor for the relator to inspect the records, &c., of the Corporation. If the affidavit could not be used, the order for inspection would be rendered futile.

(1) *The Sydney Morning Herald*, Nov. 6 and 10, 1846.

(2) 3 Term Reports 314.

Foster, contra. The information should have been obtained before the rule nisi. *Lord Kenyon's* remark in the case cited only applied to affidavits introducing new matter.

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THE COURT decided, upon the decision of *Rex v. Newling*, that the affidavit, so far as it was merely confirmatory, might be used, but that all new matter would have, in the consideration of their judgment, to be excluded.

Lowe read the affidavit.

Foster showed cause. The matter was one wholly in the discretion of the Court. The affidavit of Mr. *Egan* showed that he was not directly or indirectly interested in any contract, &c., with the Council. He had bid at the sale of the Fountain Revenues, and had signed the subsequent memorandum solely as the agent for one *Hugh McLean*; he had never received any lease, and was not nor ever had been interested in any such contract.

Lowe, in reply, was directed by the Court to argue the point whether, from the terms of the Incorporation Act, it was necessary to show that the parties sought to be disqualified were not only contractors in name, but had a personal and beneficial interest in the contract. He contended that the only duty devolving on the relator was that of showing that the case was a proper one for inquiry. The case was not like an application for a criminal information, where the Judges were placed in the position of a Grand Jury, but a mere application to try a question of right, subjecting the party concerned to no penalty, and the only duty cast upon the Judges was that of seeing that the application was not a frivolous one. The affidavits showed that *Egan* had himself tendered security for the due performance of his contract. (He was stopped.)

THE CHIEF JUSTICE, in pronouncing the decision of the Court, alluded in the first instance to the objection which had been taken by Mr. *Foster*—that the colony did not possess the necessary machinery for disposing of a question of this nature. In England these informations were filed by the Master of the Crown Office, but in this colony there was no such officer, nor any person whose duties were analogous. This difficulty, as far as regarded criminal informations, had been got over by the 9th George IV, the sixth section of which gave a power to individuals to file criminal informations, with the consent of the Court, in the name of the Attorney-General. If this proceeding, therefore, could not be regarded as a criminal information, a question might arise as to whether the defendant would be bound to plead to it; but it was not necessary

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at present to decide this point, for the only question they were called upon to determine was, whether the relator had made out sufficient grounds to require a further investigation : and the Judges were of opinion that he had done this. They presumed that Mr. Egan, in swearing that he had no interest in any contract with the Council, meant that he had no beneficial interest ; but they were of opinion that any interest, either legal or beneficial, would under the terms of the Act, be sufficient to disqualify. The rule therefore must be made absolute ; but in determining this they wished to be particularly understood as giving no decision upon the facts, the mere question for their determination being whether there should or should not be a further investigation.

Rule made absolute.

REGINA v. M'INNIS. (1)

1846.

Criminal Information—9 Geo. IV, c. 83, sec. 5—*Right of defendant to traverse applicant's affidavits—Costs.*

Nov. 21.
Stephen C.J.
Dickinson J.
and
Therry J.

To induce the Court to grant a criminal information a *strong presumption of the party's guilt* is not necessary, but merely such a state of facts as shows that there is *sufficient ground for further judicial inquiry*.

In granting such the Court does not act in *all respects* as a Grand Jury, and the defendant may show cause by way of traverse of the matter in the applicant's affidavits.

The grant is not a matter of course, but in the discretion of the Court, and although a *prima facie* case may have been made, on showing cause both sides must be heard, and if satisfied of the innocence of the accused, the Court is bound to discharge the rule *nisi*.

Also (*per the Chief Justice and Therry, J., Dickinson, J., dubitante*), the Court has the power to discharge the rule with costs.

MOTION to make absolute a rule *nisi* for a criminal information calling on the defendant to answer a charge of having committed perjury, at the trial of the prosecutor for forgery. The facts are set out in the previous case of *Regina v. Cummings* (2), and in the judgment of the *Chief Justice* herein.

Michie and *Lowe* showed cause.

Windeyer, in support of the rule.

Cur. adv. vult.

The Court delivered judgment separately as follows.

THE CHIEF JUSTICE. In the case of *Cummings* (3), on the motion made in this Court in May last, for the criminal information which was afterwards filed against him for forgery, we expressed the opinion that to induce the Court to place an accused person on his trial, a *strong presumption of the party's guilt* was not necessary; but merely such a state of facts as showed that there was *sufficient ground for further judicial inquiry*. The opinion then expressed, is one to which we adhere; and by which we shall be guided on this occasion. On an application of this kind, we need not say, nor ought we to say, that the party accused is

(1) *The Sydney Morning Herald*, Nov. 24, 1846.

(2) *Ante*, p. 289.

(3) *Ante*, p. 291.

1846. guilty. Neither need we be of opinion that there exists a strong presumption of his guilt. If we think, on the evidence before us, that
 REGINA v. M'INNIS. there is ground for further inquiry, we ought (assuming the case to be in other respects a proper one for our interference) to send the case to a jury, that such inquiry may be had.
 Stephen C.J.

It is of great importance to persons accused, that this principle should be adhered to. They will then take their trial, without the prejudice that would arise from a previous opinion, of a decided character, expressed by the Judges of this Court against them. But to hold, or to suppose that it thence follows, that we have not the power, or have not imposed on us the duty, where the facts enable us to say so, of declaring the party to be wholly *innocent*, would be in my opinion monstrous. What! if we see plainly from the evidence, that a man is falsely charged, or the evidence be such that we feel certain no set of men would or could pronounce him guilty, are we nevertheless to expose him to the shame, and humiliation, and expense of a fruitless trial! To hold so would be to place persons accused before us in a most pitiable condition, and to give a triumph only to audacity and wickedness. The Court would then be powerful only for evil, and helpless to do good. We should indeed retain the sword, but with permission to strike with it in one direction only, and that, to give impunity to accusation, however malevolent and unfounded. But such is not the position in which we are placed. We are to say, on the evidence before us, whether there is ground for further inquiry. Or I may put the question in another way. Would any Magistrates, *with the same evidence before them*, hold the party accused to bail, or any Grand Jury *on the same evidence* find a true bill? And if that evidence lead irresistibly to the conclusion that the charge is incredible, is contrary to all human probability, and withal is refuted, can we hesitate to say that no Magistrate or Grand Jury would so act? But the conclusion supposed necessarily involves the question of innocence; and therefore, on that we should have in such a case to pronounce an opinion. If the evidence satisfies us that the accused is innocent, it would be absurd to suppose that we could say there ought to be further inquiry. It is only when the accusation appears established, or the facts, or the inferences drawn from it, are left in doubt, that we can so determine. But we can never assent to the doctrine, that notwithstanding a clear defence, to our minds incontestably established, we are still to send the accused to stand his trial, as if this Court were a mere instrument in the hand of the party accusing, and the defendant was gravely to be called on to show cause against a result so disastrous to him, without our having

the power to determine on the sufficiency of that cause. Matters merely of explanation, indeed, or of law, it is said, may be taken into consideration ; but a refutation, however plain, is beyond our province to inquire into. Such, we are distinctly of opinion, is not the law.

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It has been contended that the Court is, in cases of this kind, merely in the position of Grand Jury ; but according to *Blackstone*, even a grand jury "ought to be thoroughly convinced of the truth of an indictment." (4 *Steph. Com.* 370.) Why, then, are *we* to indict if not so convinced ? I deny, however, that this Court is in all respects in the position of a grand jury. In the first place, by the very course and nature of the proceeding before us, we hear both sides of the question, which a grand jury does not. This Court, it has been urged, is by the statute substituted for a grand jury. It would be more correct to say, that it is in cases of this kind substituted for the Attorney-General. By that Act, (9 Geo. IV, c. 83, s. 5) until provision be made for proceeding by a grand jury, all crimes are to be prosecuted by information, in the name of that officer. But by the succeeding section, any person by leave of the Supreme Court, may exhibit such an information, without his intervention. It is not to be assumed, however, that it is therefore the right, or within the power, of every man, without cause assigned, and at his own discretion, to obtain that leave. What cause shall be held sufficient to induce the Court thus to interfere, in cases of felony, or misdemeanors not the subject of prosecution in England, by the Master of the Crown Office, has not yet been determined. In the case of *Cummings*, already cited, the question was not distinctly raised : but it was necessarily involved in the decision ; and the Court was there undoubtedly of opinion, that sufficient ground for the application was established. The point on which we differed was, whether on the evidence before us it ought to be successful. In cases of perjury, where the jurisdiction of the Magistracy is doubtful, especially if in fact no Magistrate has been applied to, or in any case where Magistrates have been applied to, but (as in that case) there was a difference of opinion between them, or in cases where a Magistrate can be shown to have been palpably mistaken, or where the Attorney-General shall have declined, without sufficient grounds, to institute the prosecution, it is probable that the Court will think it their duty to entertain the application. But that it is not a matter of course, (notwithstanding the existence of facts showing grounds, in themselves, for further inquiry,) this Court has already determined. In the case of *Macdermott*, in October, 1844 (4), the *Chief Justice* in delivering the

(4) *Ante*, p. 236.

1846. judgment of the Court, used these expressions :—" Under what circumstances this Court may feel called on, in any particular case, to exercise the power of intervention, in cases beyond the jurisdiction in this respect of the Queen's Bench, we need not now consider. But to hold that, in those cases any more than in cases of misdemeanor, like the present, the Court can have no discretion as to interference, and may not require adequate grounds to be shown, for a departure from the ordinary and prescribed course of prosecution for crime, would be to place this Court in the mere position of an alternative Tribunal, for the initiation of prosecutions, on every occasion, concurrently with, or to the exclusion of the Attorney-General, at the discretion of any individual in the community, desirous of exposing his neighbours to such an ordeal." Such a result as this, we clearly conceive, the enactment never contemplated. It would be to impose on this Court the duty, which it was clearly the intention of the Legislature should, under ordinary circumstances, be discharged by the Public Prosecutor.

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The question which we have to determine, assuming this to be a fit case for our interposition, a Magistrate having been applied to, and having decided by dismissal of the charge, is not necessarily whether that dismissal was warranted; but, as we have already observed, whether on the evidence before us there is ground for further inquiry. And I am most clearly of opinion, that there is no such ground. I entirely concur with the estimable and able Magistrate (5), who dismissed this case at the Police Office, that without believing the accused to be insane, it is not possible to believe the story that the prosecutor brings against him. Every probability is against that story; every probability is in favour of, and supports the statement made by *M'Innis*. In the year 1839, *M'Kenzie* sold *Cummings* a herd of cattle, for a sum of about four thousand pounds, to be paid for at the end of four successive years; and to be secured by promissory notes, which were to have the names of *Thomas Cummings* and some other person, as sureties. It is to my mind incontestably proved, that the second surety was arranged to be *Jeremiah Grant*, and that *Cummings* undertook to procure his signature. It is proved, that the notes were given to *M'Innis* by Mr. *Wright*, in order that he might accompany *Cummings* to *Grant's*, to obtain it. *M'Innis* was the agent of *M'Kenzie* in the matter, and, after obtaining the signature, he was to proceed with *Cummings* to the station, and there deliver the cattle. *M'Innis* swears, that he thereupon did accompany *Cummings*; that he went with him to *Grant's* residence at Belubula;

(5) C. Windeyer, Esquire.

that there they staid two days ; that on the second, a man made his appearance, whom (*M'Innis* not knowing *Grant's* person) *Cummings* introduced as *Grant* ; that that person signed the notes ; and that, then, the two (*M'Innis* and *Cummings*) proceeded in company together, to the station, where the cattle were delivered. Finally, as he says, he proceeded to Bathurst, and gave the notes back to *Wright* ; and there the matter ended. From that time, the notes were among all concerned supposed to be *Grant's* ; until suspicion arose on the subject, somewhere about two years afterwards, when *M'Innis* was at New Zealand, and consequently unable to give any evidence in the matter. A suit was instituted by *M'Kenzie* against *Grant* on them, but the latter pleaded a denial of the making. At length *M'Innis* comes up to this colony ; when, on being shown Mr. *Grant*, he declares that he was not the man and that some other person had been palmed on him. Now, unless *Wright* and *M'Kenzie*, and his brother are all perjured, the notes in question were delivered to *M'Innis*, and returned by him to *Wright* with the apparent signature of *Grant*, and by *Wright* given up to *M'Kenzie*, before the end of May. But the story of *Cummings* is, that *M'Kenzie* undertook to procure *Grant's* signature ; and that he (*Cummings*) never went with *M'Innis* to procure it ; that he never was with him at *Grant's* ; and, consequently, that *M'Innis's* statement as to what passed there are wholly false—that, in fact, so late as the month of July, *M'Innis* told him that *Grant's* signature had not then been procured, but that he was going to Mount York (where *Grant* is said to have resided at that time) for that purpose. To sustain this statement he produces two witnesses, *Smith* and his wife, formerly servants to *M'Kenzie*, who not only declare that *M'Innis* told the same thing to them, in August or the latter end of July, but showed them the notes without *Grant's* signature. They add, that two days afterwards *M'Innis* produced the notes with that signature on them ; and, on *Smith* expressing a doubt whether the signature was genuine, they say that *M'Innis* observed that it did not signify, for *Cummings* was an honourable man, and would be sure to take the notes up. So that, in opposition to the plain and natural account given by *M'Innis* (as to which it is impossible to suggest one motive for the perjury imputed to him, and to commit which he has twice come to the colony from his residence and pursuits in another island), we are called on to believe this monstrous fiction, that *M'Innis*, without a conceivable object, pretended to procure *Grant's* signature ; then, in fraud and to the injury of his employer, forged it, or procured it to be forged ; and then, with the folly of idiocy, confessed (also with no imaginable motive) to two persons,

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between whom and himself no intimacy, if any, is suggested, that he had committed that offence ; all this, however, happening in *July* or *August*, at a time when, as is sworn by three persons, the identical instruments had been long completed, by the real or pretended signature of *Grant*, and were safe in *M'Kenzie's* possession. I agree with the upright magistrate who heard these rival stories, that to believe the latter is impossible. It would be to surrender one's reason, and to credit something so atrociously incredible, that one is more astonished at the audacity of the invention, than its villany.

There remains but one point ; whether we shall send this gentleman to take his trial, for the disgraceful crime of perjury,—although on the evidence wholly absolved from all imputations, on the only matters which he was likely to have remembered,—because he happens to have sworn contrary to the fact, that he and *Cummings* were in company the whole distance, between Bathurst and the cattle station, and that *Cummings* rode a black horse, instead of a grey or brown one. I am clearly of opinion, that such a result would be if possible even more unjust, than were we to put him on his trial for perjury, in swearing that he was with *Cummings*, and the pretended *Grant* at Belubula. That he was to have been in company with *Cummings*, he would remember, for he was to be present when *Grant* signed the notes ; and for that purpose, and the delivery of the cattle, both of them would necessarily be together. Their being together at starting, and nearly the whole way to *Grant's*, with their meeting at the station, a few days afterwards, would tend to confirm the impression after a lapse of years, that they were never apart. The fact of their being apart for some hours on one day, and afterwards for three or four days, would be as likely to be forgotten, as the colour of his companion's horse. I do not commend rash and confident swearing on such points ; but, that *M'Innis* perjured himself in those particulars, there is not one single circumstance in the case, to justify us in suspecting.

It is the unanimous opinion of the bench, that, if we have the power, we should dismiss the application in this case with costs. I entertain no doubt, that we do possess that power. In certain cases of misdemeanor, the Queen's Bench in England has the same power by statute, of directing the filing of a criminal information, that this Court possesses in cases both of misdemeanor and felony. But that Court without any enactment in that respect, has the power of discharging a rule *nisi* for any such information, with costs. I conceive that this Court, therefore, the circumstances being the same, and its jurisdiction being by statute,

as ample in all cases as that of the Queen's Bench, also possesses that power. Convinced as we all are of the entire innocence of Mr. *M'Innis*, it is clearly our duty, as far as in us lies, to save him harmless from the unfounded charges brought against him. Mr. Justice *Dickinson*, I believe, entertains some doubt as to our power; but none, if the power exist, of the propriety of exercising it. With the concurrence, however, of the other of my colleagues, costs will be awarded, and the Rule in this matter is discharged with costs accordingly.

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DICKINSON, J. I agree with the *Chief Justice* in the opinion he has expressed on the case, and will add a few observations only.

In this case *William Cummings* has obtained a rule calling *Alexander M'Innis* to show cause why a criminal information should not be exhibited against him.

In obedience to this rule, *M'Innis* has appeared and has shown certain matters, on affidavit, for cause, and the question we have to determine is, whether those affidavits exhibit sufficient cause to prevent our making the rule *nisi* absolute. It has been urged that this Court is in the situation of a grand jury, which hears only the prosecutor's case. But the practice of the Court has been to call on the accused to show cause, and, therefore, it is clear that this Court has not in these cases, acted in *all* respects as a grand jury.

The statute 9 Geo. IV, c. 83, sec. 6, contemplates the case of the Court requiring exculpatory affidavits, and in this respect also the Court in this jurisdiction differs from a grand jury. Thirdly, the Court is to grant leave for the exhibiting the criminal information, and in that respect also it differs from a grand jury.

I am of opinion that this Court has a statutory power, upon hearing both parties, to grant leave to the prosecutor to use the Attorney-General's name in a criminal information.

Though *Cummings* has induced the Court to call upon *M'Innis* to show cause, he now insists that the only cause *M'Innis* can show is matter in confession, and avoidance of that in the affidavits on which the rule *nisi* was obtained, and that the Court cannot deal with the cause shown, if it be in traverse of the moving affidavits—That the Court in the exercise of this peculiar function, cannot balance evidence.

If the Court is to act differently from a grand jury by hearing both sides, I can see no more reason for its pronouncing on the sufficiency of

1846. cause in confession and avoidance, than for balancing the probability of
 REGINA the case upon cause shown by way of traverse of the matter in the
 v. applicant's affidavits.
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Dickinson, J. It appears to me, then, that in such a proceeding as this, we must hear both sides, as in other cases of showing cause against a rule nisi; and then, if we think there is a matter for judicial enquiry, we should grant the leave asked, but if we are satisfied of the innocence of the accused, we are bound at once to discharge the rule nisi.

I am satisfied that *M'Innis* is innocent of the crime of perjury imputed to him.

As to the main point, namely, that *Cummings* procured a person to sign *J. Grant's* name to the notes, this is expressly denied by *Cummings*. I do not place the slightest reliance on *Cummings's* affidavit, for *Cummings* has substantially sworn to the fact that about July or August, 1839, *M'Innis* told him he was going to get the notes signed at Mount York. This appears from the affidavits of the Messrs. *M'Kenzie* and *Mr. Gilbert Wright* to be demonstrably false. He not only swears to this falsehood himself, but uses the affidavits to the same effect of *Smith* and his wife. I have before stated my opinion that the Court can balance the testimony; I have attended closely to the testimony, and I have weighed the testimony, and I believe the Messrs. *M'Kenzie* and *Mr. Wright*, and I utterly disbelieve *Cummings* and the *Smiths*.

As to the inaccuracy of *M'Innis's* testimony, in respect of the horse, and of his having been in *Cummings's* company the whole way from Bathurst to Belubula, and from thence the whole way to Grudgery, and arriving at the latter place in company of *Cummings*, my mind is not affected against *M'Innis's* veracity by reason of it. For *Cummings*, by swearing that *M'Innis*, in July or August, said he was going to get the notes signed, must have intended to throw discredit on *M'Innis's* story, which detailed that they had been signed at an earlier period; and as I am of opinion that *Cummings* in that swore falsely, I believe that part of *M'Innis's* story which the last mentioned swearing of *Cummings* was evidently intended to discredit. As, therefore, I believe the main part of *M'Innis's* story, I see nothing in the inaccuracies about the horse and his being with *Cummings*, more than a too confident adherence to his opinion of what had passed seven years before. Certainly there is nothing which induces me even to suspect that *M'Innis* wilfully falsified attendant circumstances to induce the jury to believe the principal truth.

As to the costs, I am not able to satisfy my mind on that question, and I therefore neither concur nor dissent from my colleagues upon the point.

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THERY, J. The present case has been deemed of sufficient importance to induce an individual expression of opinion by each member of the Court. I therefore proceed to express mine, and in doing so propose to avoid, as far as I can, unnecessary repetition, which is in some degree unavoidable when persons have to travel over the same ground, and are engaged in the expression of concurrent opinions. I do not propose to do more, however, than to confine myself to those prominent parts of the case by which my attention was arrested, and which have governed me in coming to the conclusion at which I have arrived.

It has been urged, and I quite assent to the general truth of the proposition, that it often is no very easy matter to account for crime by endeavouring to trace and determine the motive to its commission. In the case even of the greatest crimes, the motive is often seemingly so slight as to be quite inadequate to the enormity of the offence, and to baffle any attempt at establishing a proportion between crime and the motive that prompts to its perpetration. But it is a still more difficult thing to assume that a party will commit crime without any motive whatever—to suppose that without any inducement arising from anger, revenge, interest, or advantage of any kind, a person will gratuitously commit what the law emphatically designates “the odious crime” of perjury. The difficulty to suppose a party guilty of such an offence is still more increased when every apparent motive that might suppose to arise from connection, interest, or friendship, suggests the improbability—nay, the moral impossibility of his committing the crime imputed to him. It is manifest that throughout the whole of this transaction *M'Innis* stands in the relation of a confidential servant and friend of *M'Kenzie*. It is to serve him that he makes two voyages from New Zealand to New South Wales, at great personal inconvenience; and if his zeal for his friend had prompted him at the expense of the truth to serve *M'Kenzie's* interests, he would not have selected (with his eyes open) a most dangerous perjury which in no way served *M'Kenzie*: instead of a palpably easy one which would have materially served him. The handwriting on these notes, it seems, was by all the parties believed to be *Grant's*, and had *McInnis* sworn that it *was* his—that *Grant* was really the man who signed, anywhere or at any time,—there can be little reason for doubting he would have been believed, and thus *M'Kenzie* would have been enabled successfully to sue *Grant*, and get

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his money. This would have been indeed to have served his friend *M'Kenzie*; but so far from serving him, *M'Innis's* testimony in any action *M'Kenzie* may bring against *Cummings* puts him out of Court, so that the perjury imputed to him is a perjury committed for the purpose of injuring him whose interests it was his obvious wish and motive to promote, and for even the far less probable purpose of relieving *Grant*, whom he never saw or knew, from liability on those notes. It is not too much to say, in the language of the learned counsel, that "our reason revolts from the supposition of any man being capable of such conduct as this."

But these depositions are not limited to the imputation of perjury against *M'Innis*. They contain as distinct a charge against him of forgery or the procurement of forgery as they do of perjury. This brings me to the *Smiths'* affidavits, in which these charges are distinctly conveyed, and certainly two more incredible documents (at least incredible to my mind) it has not been often allotted to me to peruse. They possess one quality in a remarkable degree, that of consistency with each other. They purport to disclose, each in the very words, *ipsissimis verbis*, in which *M'Innis* is alleged to have spoken them, the statements made seven years ago by him. The production of the bills by *M'Innis* on his return from the Big Hill—the doubt expressed by *Smith* of his having been there, and the remarkable expression, "What odds, *Cummings* is an honourable man, he will pay the bills," is narrated with a remarkably corresponding accuracy, which not only shows an agreement substantially as to the whole of what passed, but with a somewhat too close precision as to the minutest parts of the conversation, to be calculated to inspire confidence. There are some other statements in the *Smiths'* affidavits, which I yet deem it right to notice in considering the degree of credit to which they are entitled. *Smith* states that when he saw the bills in July or August, at which time *Grant's* name was not to them, *M'Innis* told him "he was going to old Mr. *Grant's*, at the Big Hill, Mount York, to see *Jeremiah Grant*, to get the bills signed." Well! when *M'Innis* told him this, why did he not inform *M'Innis* that *Jeremiah Grant* did not live at the Big Hill. If he were then aware of the fact of his not living there it would have been natural for him to have said, "There's no use of your going to the Big Hill, for young *Grant* does not live there." He says nothing of the kind, however, but allows him to proceed on what he must have then known to be an unavailing errand. The moment however *M'Innis* is represented to have returned, *Smith* becomes full of suspicion against him. He states for the

first time to *M'Innis* that he understood that *Grant* did not live there—and then arises a suspicion in his mind of *M'Innis* having been there at all. He questions him as to the colour and complexion of young *Grant*—doubts whether he had seen *Grant* at all—doubts whether his horse could carry him—and at length would fain represent by the ingenious suggestion of doubts, and a skilful questioning of *M'Innis*, that he extorted from him that extraordinary declaration, “What odds! *Cummings* is an honourable man, and when the bills become due he will pay them,” which, if it means anything, means this—“True! all your doubts are well founded, I did not see young *Grant*; my horse, it is true, could not carry me; the signatures are not genuine; I either forged them or procured them to be forged; but what odds, *Cummings* is an honourable man, he will pay them.” But what opportunities of knowledge of *Cummings* had *M'Innis* that he should consider him this honourable man, or that he, hitherto a free citizen, should incur this terrible risk, and commit this unprofitable and audacious felony. There was no intimacy between them, for *Cummings* himself says, as to his meeting him at *Grant's*, or any house at Belubula, “I might have met him as a stranger there,” and there is no pretence for supposing that at any time there was any friendship or intimacy between them. In the very able address in support of making this rule absolute, I own I expected some explanation or remark upon the affidavits of the *Smiths*, but it appeared to me that no aid in support of the rule was sought to be derived from them, but on the contrary, all aid from that source was rejected and repudiated, and it was sought to disconnect *Cummings* from the *Smiths*, but *Cummings* himself has too closely identified himself with their statement to admit of this separation, for he states in support of *Smith's* statement that *M'Innis* “had told him about July he had to go to Mount York to get his bills signed.” And if *Cummings's* corroborative testimony in support of the *Smiths's* statement be demonstrably false, what reliance can be placed on the other portion of his evidence affecting *M'Innis*, as to what took place at Belubula and at Grudgery? The discredit due to *Smith's* affidavit does not arise alone from the utter improbability of the statements therein contained, which would fain represent *M'Innis* as a most gratuitous knave, but from the strong and positive contradictions of the two *M'Kenzies* and *Gilbert Wright*, which (unless they have committed perjury) incontestably establish the utter impossibility of their statements being true, for at the very time—long before the time—the *Smiths* speak of the notes being unsigned in *M'Innis's* possession, they were in *Wright's* or *M'Kenzie's* possession, with the real or pretended signature of *Grant* to them. Surely, then, it

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is not upon statements such as these—statements disclosing facts in which, from their improbability, a reasonable and ordinary mind can place no confidence, and on which, from the positiveness with which they are encountered and contradicted, no reliance can be placed as a safeguard to divert and govern our judgment, that any Court would be justified in sending a fellow-citizen, hitherto of untarnished reputation, to go through the ordeal of a trial for an offence which, though it be not a felony, entails upon him who is convicted of it as deep and lasting an infamy as any offence in the whole catalogue of crime. And if our duty be, as it is suggested, analogous to that of a grand jury, on being invited on such testimony to send a man to trial for such an offence, does it not behove to bear in mind the wholesome counsel given to grand juries in *Mr. Dickinson's Guide to the Quarter Sessions*, p. 143, “that on their finding, the defendant is not only liable to be apprehended, and compelled to find bail, or to be imprisoned if he cannot obtain sureties, but he must, in order effectually to defend himself, incur expense for which, however innocent he may be ultimately found, the law affords him no recompense, unless through the difficult and uncertain course of an action, and then only when he can show the charge to be malicious as well as groundless, and thus the character and fortunes of an honourable man may for a time at least be deeply affected in the opinion of the many who want moral discrimination to separate the charge from proof, and to believe in the evidence of the life of the accused against the breath of an accuser.” Although our duties are analogous to, they are not identical with, those of a grand jury. If we are at the disadvantage of not having *viva voce* testimony, we have at least the advantage by calling on the defendant to show cause, of hearing both sides (though upon affidavit), which a grand jury does not. If what the defendant urges in his behalf is not to influence our judgment in coming to final judgment, I cannot conceive for what purpose we should call upon him to show cause at all. If wherever there be even a *scintilla* of evidence against him the question of guilt or innocence should be submitted to a jury—and as there must such a question be involved in the affidavits on which a rule *nisi* is granted, it is far better to dispense as with an idle form, the process of requiring him to show cause, because if the doctrine contended for be consistently acted upon, the prosecutor may at all times say to the Court—“Be it granted that the explanations disclosed in the defendant's affidavits are quite satisfactory, and establish his innocence to the satisfaction of the Court, and even to my own; yet it is neither for me, the prosecutor, or for you, the Court, to determine the question of guilt or innocence. I fall back on the original affidavit

on which the rule *nisi* was granted, and as it contains *some* evidence against the defendant, he must therefore go through the ordeal and expense of a trial, which however will be attended with very little danger, as the Court that sent them there, and the prosecutor who procured them to be sent there, have done so with an unequivocal declaration of his unquestionable innocence." Such a principle of action, if adopted by this Court, would, I doubt not, be hailed by any person disposed to institute a vindictive prosecution, for he has only to get up a charge supported on evidence, *it matters not how trivial*, and by appealing to the precedent which the adoption of such a principle would establish, in a manner command this Court to be the instrument of his vindictiveness, and subject the victim he may select to the cost and anxiety of being tried unfairly. So far I should be disposed to act upon the principle which should alike govern Grand Jurors in finding a true bill, and Justices in committing parties to trial, that if the whole evidence before the Court shall be sufficient to raise a strong presumption of guilt, or to furnish sufficient ground for judicial enquiry into his guilt—in such case the rule should be made absolute; and applying that principle here to the whole body of facts that have been arranged on both sides, I should not hesitate to declare that having heard, as a Grand Juror, all that has been advanced in these depositions—having considered the utter absence of any motive that could prompt *M'Innis* to the commission of the perjury imputed to him—having considered the attempt which has been made to involve him in the double crime of perjury and of forgery, but which attempt has signally failed—and moreover considering that the discrepancies between his testimony and the other witnesses, as to the colour of the horse that *Cummings* rode—the circumstance of his accompanying *Cummings* from Clear Creek to *Grant*, and of his arriving in company with *Cummings* at Grudgery, are discrepancies into which, in the lapse of five or seven years, memory may fail, without the slightest tinge of corruption, or being liable to the imputation of wilfulness or design in misrepresenting these facts, in some of which it now appears he has been mistaken; I cannot arrive at the conclusion that a case has been made out which furnishes a sufficient ground for judicial enquiry into his guilt, or even raise a strong presumption of guilt against him. Even the alleged discrepancies are not established by satisfactory evidence. The fact of his not having travelled with *Cummings* from Clear Creek, rests mainly on *Cummings's* evidence alone. It may be that he was not with him when *Cummings* passed *Perkins* at Evans's Plains; but though not in company together there, they may have joined at other parts of the road. *Perkins* admits that

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M'Innis might have been at *Grant's*, but only states that he did not see him there, and positive testimony to the fact of his not having been at *Grant's* rests on *Cummings's* sole denial. But we find the several witnesses very loose in their account of dates as to the time *M'Innis* and Mr. *Cummings* came to Grudgery. *Harrold* says *M'Innis* was there three or four days before *Cummings* came; *Smith* states it to have been a week, but a discrepancy such as this, after such a lapse of time, is unavoidable, and if it may be pardoned to one witness, may, and ought, it not with equal fairness to be pardoned to others? As to the colour of a horse which a man rode in another's company five or six years ago, it certainly appears to me an imprudent thing for any person to undertake to swear to so trivial a circumstance after so long a lapse of time; but it may be that he was strongly impressed with the truth of this statement, and it is utterly inconceivable to me why he should make a wilful misrepresentation of such a circumstance to induce a belief in the two main facts of the transaction in which he was engaged—1st, the signing of the notes; and 2nd, the delivery of the cattle. In considering the part of the case that relates to the party who undertook to get the signature of *Jeremiah Grant*, who, that is at all conversant with the business of life, can doubt the truth of Mr. *Wright's* statement, "that the undertaking was an undertaking on the part of *Cummings*? He was the purchaser, and who before heard of a seller parting with his property to a purchaser, and also undertaking to provide that purchaser with security for the payment of his debt? The memorandum of *Thomas Cummings* for further landed security only shows that if *Grant's* security were not obtained another security should be substituted, but substituted only on the failure of *Cummings* to procure the security of the name which he promised to obtain. Throughout these proceedings there is not suggested a probable ground for expecting that *J. Grant* would become security for this large amount. It is not stated or suggested by *Cummings* that *Grant* had previously promised or that he had ever previously asked him, and it would appear that the use of his name in the transaction of the sale had been as unwarranted as (if *M'Innis's* statement be true) the means were unwarrantable which had been used to make it appear it had been obtained. I have dwelt on some of the leading circumstances of this case, which have impressed themselves upon my mind, because, being strongly impressed on the whole of these depositions with the innocence of this defendant, I deem it a duty I owe him to declare it. In my estimation he retires from this Court with the same unblemished character with which he entered it. If others are affected, or suppose themselves to be so, by this unanimous opinion

of the Court, they should have considered and weighed all the consequences of their conduct before they moved in this business. They need not have invited or invoked the opinion of the Court, but, having done so, they cannot complain that the Court has not been prevented from declaring it, by means of devices too weak, and of subterfuges too shallow, to impose upon the meanest understanding. As to costs—being of opinion, on the authorities cited, that the Court has the power, I am satisfied that this is a fit occasion for the exercise of that power in obliging the prosecutor to pay them.

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Rule discharged, with costs.

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Mandamus—Fraudulent concealment of insolvent's property—Power of Justices to commit—Interest of creditor to apply—Variation of commission of Justices from ancient form—18 Ed. III, c. 2 ; 34 Ed. III, c. 1.

The question in this case was whether a *mandamus* could issue to compel a justice to proceed in the matter of a complaint against a person for having fraudulently concealed and removed his property with intent to defraud his creditors, the grounds of the Justice's refusal being his want of jurisdiction.

Held, that a Justice has jurisdiction.

An application for a *mandamus* need not be made against the magistrates generally.

The prosecutor, a creditor of the insolvent, had a sufficient interest in the matter to entitle him to this remedy.

The commission of the Justices is not invalidated by reason of its variation in form from the ancient forms used in England.

The jurisdiction of the justices is extended to all trespasses whatever by 34 Ed. III, c. 1, and is not limited to trespasses against the peace, as in 18 Ed. III c. 2.

Even if such jurisdiction did not extend to the *trial* of cases of fraudulent insolvency in Quarter Sessions, yet a Justice can out of sessions inquire, and commit, or hold to bail.

THE facts and arguments in this case appear in the reserved judgment of the Court, which was delivered by—

THE CHIEF JUSTICE. This was a rule obtained in the last term, calling on *Charles Windeyer*, Esq., one of Her Majesty's Justices of the Peace, to show cause why a *mandamus* should not issue commanding him to proceed in and hear the matter of a certain complaint, preferred before him by *John Stirling*, on behalf of the Bank of Australia, of which he is the Chairman, charging one *Hughes* with a misdemeanor, under the Insolvent Act, in having fraudulently concealed and removed certain property, with intent to cheat his creditors. It appeared that the magistrate's only objection to proceeding in the matter was the doubt which existed—or had been raised—as to his jurisdiction in such a case. He expressed his readiness to hear the case should the party charged appear before him ; but he declined, on the ground stated, to issue any warrant for his apprehension. The motion was made, therefore, in no disrespectful spirit towards the magistrate, but for the purpose, virtually, of deciding a point which was felt to be one of much importance.

(1) *The Sydney Morning Herald*, April 16, June 14, 1847.

Mr. *Windeyer* and Mr. *Lowe*, in showing cause, objected to the application, *first*, that this proceeding was unnecessary, as the prosecutor could apply to the Court, by notice for a Criminal Information; but that, supposing the application to be otherwise admissible, it should have been made, in point of form, against the Magistrates generally. *Secondly*; that a mandamus would not go, in any doubtful case, as they contended this to be; nor, they submitted in any case of preliminary investigation only; but not, certainly, in a case where the object was, as here, not simply to direct the magistrate to proceed, but to proceed by a particular course and mode. *Thirdly*, however, they took exception to the Justices' commission, and maintained that every application of this nature must fail, on the ground that there was no valid commission of the peace in the colony. Ancient forms, they said, could not be departed from: but the ancient form of the commission, as used in England, was departed from in two things—first, in giving power to the Justices in Sessions, *or any or either of them*, instead of limiting the power to *any two of them*; and, secondly, in omitting to specify the mode of enquiry, *i.e.*, by a Jury of twelve men. The commission was, therefore, bad in part; and that part was the most material one, because it was the clause giving the Justices power to try: but, if bad in part, the commission was void altogether. *Fourthly*, the particular question of jurisdiction, in a case of fraudulent insolvency, was then argued. It was contended, that the power to commit flowed from the jurisdiction given to *try*; so that, where the Court of Quarter Sessions could not try, Justices of the Peace could not commit the offender. And, if they could not commit him, (or, in a case of this kind, we presume, hold him to bail, or arrest to compel his appearance) it would be idle to say that they could put him to answer, in a preliminary investigation. Then it was maintained, that the offence of fraudulent insolvency, being created by a recent enactment, without express power given to Justices to try it, and, moreover, not being an offence against the peace, or tending to a breach of the peace, could not be tried in the Quarter Sessions. It was contended, further, that the Quarter Sessions in this colony, at all events, by reason of the terms used in the 9 Geo. IV, c. 83, s. 17, could not try any offence created subsequently to that enactment.

These objections and arguments were opposed by Mr. *Foster*, on behalf of the party moving. He contended, that a mandamus will always be granted, where the object is to compel the performance of a public duty, and the applicant has no other specific remedy, to enforce it. The learned counsel maintained, that in the cases cited, or most of them, there was no indictable offence, and that the effect of the decision,

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1847. therefore, was mistaken. It was not held that the Quarter Sessions, merely, had no jurisdiction over such offences. He denied that the power preliminary to investigate, existed only where there was power to try ; and he instanced the case of treason, misprision of treason, and forgery at the common law. As to the commission in this colony, the variation was rendered necessary, by the peculiar powers entrusted to the Quarter Sessions, over transported offenders. Lastly, the application was right, in form. The writ went against the individuals, merely, whose interference had been sought and refused.

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The cases and authorities on the several points were the following :—
4 *Steph. Com.* 336 ; *Hawk., P.C. bk. 2, c. 1* ; *Bac. Ab. Justices, C. and E.* ; 2 *Hale P.C.* 109 ; *Dickenson's Q.S.* 129 ; *Com. Dig. Prerog. D.* 29 ; *The Queen v. Bartlett* (2) ; *The King v. Higgins* (3) ; *Butt v. Conan* (4) ; *The King v. Dayrell* (5) ; *The King v. Rispal* (6) ; *Same v. Clough* (7) ; *Same v. Barker* (8) ; *Same v. Bristow* (9) ; *Roop v. Scritch* (10) ; *Lloyd v. Vaughan* (11) ; *Lane v. Cotton* (12) ; *The King v. Archdeacon of Middlesex* (13) ; *Pye v. George* (14) ; *The Queen v. Yarrington* (15) ; *The King v. The Justices of Kent* (16) ; *Same v. Hewes* (17) ; *The Queen v. The Justices of Wilts* (18).

We have fully considered this case ; and the conclusions at which we have arrived, on the different branches of the subject, after careful examination of the authorities, are as follows. In the first place we are of opinion, that there is nothing in either the first or the second heads of objection. A prosecutor may no doubt, apply to the Court for a criminal information. But this is not the ordinary, or Common Law mode of procedure. It is, moreover, an imperfect mode ; for the prosecutor has no means of compelling any one, to make oath of the facts. If he have a right, however, to proceed by the ordinary mode, before any Justice of the Peace, it appears to us that he ought to be enabled to pursue it. "The general principle of the Court in issuing a mandamus," says Lord C. J. Abbott, in *The King v. The Mayor of Fowey* (19) "is very well defined to be, that whenever it is the duty of a person to do an act, the Court will order him to do it." The application appears to us to be rightly made, against the one magistrate only, who causes the prosecutor to come here, and it is not an application, that the latter shall

(2) 1 Dowl. and L. 105. (3) 2 East 18. (4) 1 Brod. and Bing. 573. (5) 1 B. and C. 485. (6) 1 Wm. BL 368. (7) 5 Mod. 149. (8) 1 East 186. (9) Sayer 138. (10) 4 Mo l. 379. (11) 2 Strange 1256. (12) 11 Mod. 17. (13) 3 A. and E. 615. (14) 2 Salk. 680. (15) 1 Salk. 496. (16) 14 East 399. (17) 3 A. and E. 732. (18) 8 Dowl. P.C. 717. (19) 2 B. & C. 590.

pursue any given course whatever. It is desired merely, that the Justice shall proceed in the ordinary manner. The necessity of a warrant to apprehend, or any other incidental matter, is a question with which we have nothing to do. The duty is imposed on us of deciding, first, whether the Justice has jurisdiction. If we hold that he has, our direction will then simply be, that he proceed to the exercise of it. On the manner in which that jurisdiction shall be exercised, so as to render it effectual, we are not asked to give, and we are sure that we need not give either direction or opinion.

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The only doubt entertained by any of us was, how far a private individual could be taken to be interested, in a prosecution of this nature; and whether the possession of some personal or private interest was not essential, to entitle an applicant to this remedy. But, on consideration, we think that the prosecutor in this case, as a creditor of the insolvent, has a sufficient interest for this purpose (20). The right, and in many instances the duty of individuals, to prosecute for offences, have been treated of by text writers, and would appear to be recognised by statute. We also find expressions, in the judgment of the Court of King's Bench, in the case of *The King v. Borron* (21), which imply that a mandamus might be granted, to compel a preliminary investigation, at the instance of such a prosecutor. In that case, one *Richardson* had been wounded by some person, the member of a yeomanry corps, at Manchester, against whom, *Richardson's* attorney applied to Mr. *Borron* for a warrant, telling that gentleman, who was a magistrate in the neighbourhood, that if he refused, the Court of King's Bench would be applied to. Mr. *Borron* did refuse, for reasons which he assigned, but said that he would readily investigate the charge, if the Court directed him to do so. In commenting on that passage, Lord Chief Justice *Abbott* says—"The refusal was on the 26th October, and a Mandamus might have been moved for, on the 7th of the following month" an observation which, though not decisive on this question, is important, because no *Mandamus* appears to have been previously mentioned, and the application then under discussion was one, in fact, for a Criminal Information.

The next objection is the third, that the magistracy have no jurisdiction, in any case, by reason of a defect in the form of the commission issued to them. The first answer to this may be, in a matter of such public and general concern, the extensive mischiefs that would flow, from the yielding to such an objection. The same form appears always to have been used in this territory; and it has been acted under, for

(20) And see 2 B & C. 287.

(21) 3 B. & Ald. 432.

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twenty years and upwards—a long period, in the annals of a young colony—to the knowledge of the whole public, and (as we must presume) the Legislature. Unless impelled, therefore, to such a decision, by the most plain, positive, and cogent rules of law, we should be guilty of a grievous dereliction of duty, were we at this late date to hold, that every Justice of the Peace has hitherto acted without authority. But, fortunately, we are under no such necessity. The only ground on which we are asked to do this, is the general doctrine, that ancient forms are not, ordinarily, to be departed from. The doctrine extends no further; and, indeed, if we judge from the instances given, not so far. For these have reference, rather to the *mole*, than the *form* of appointment. Admitting it, however, to the fullest extent, the rule can only apply to cases where compliance with it would be practicable. The present English form was, itself, an extensive alteration of one in use for two centuries; but the alteration was effected by no Legislative authority. And, within some twenty five years afterwards, we find Sir *Edicard Coke* recommending still further amendments. (4 *Inst.* 171.) But here a strict adherence to the English form would, until of late (that is, since the introduction of trial by jury) have been impossible. Since that period, however, the same degree of adhesion to the English form would equally render the commission abortive; because, in certain cases, the power of the Justices to hear and determine (see 6 Geo. IV, c. 69, s. 3, and 13 Geo. IV, No. 7, ss. 3 and 9) is to be exercised summarily, and not by the assistance of a jury. It is, indeed, a great error to suppose, that every doctrine of every kind established for a settled and ancient kingdom, is to be applied, under all possible circumstances, to things and persons in new and distant dependencies. In this Colony, the erection of Courts of Quarter Sessions was provided for; but with a new and unprecedented jurisdiction, and an equally novel species of trial. To adapt the power given, to the exercise of that jurisdiction, and the working of that mode of trial, a variation from the English form became, as we apprehend, unavoidable.

In addition to these grounds for holding that the *ancient form* of the Justices' Commission, as settled in and for England, may (in the particulars objected to) be altered in and for this Colony, is the circumstance, that various Acts of the Legislature have from time to time been passed, in which the existence and powers of Justices, and of the Courts of Quarter Sessions, have been recognised. By the 9 Geo. IV, c. 83, s. 17, and the Acts 10 Geo. IV, No. 7, and 3 Will. IV, No. 3, s. 14, Courts of General and Quarter Sessions were established. By the 5 Will. IV., No. 17, their summary jurisdiction is recognised and confirmed.

By other Acts, provision is made for the election of a chairman for such Courts. By the 5 Will. IV, No. 22, the exercise of the powers of the Justices out of Sessions, is regulated. By the 4 Vic., No. 22, s. 12, the Quarter Sessions Courts have power given to them to make rules. By the 10 Vic., No. 6, the power of a Justice of the Peace, in this Colony, to take examinations, and hold to bail, in criminal cases, is expressly recognised. By the 7 Vic., No. 17, s. 2, every Justice of the Peace within the Colony, is enabled to act as such at any Court of Quarter Sessions in Sydney. Considering that all these and other enactments (of which there is one, the 7 Vic., No. 25, distinctly noticing the then last Commission), were passed after the issue, and during the continuance of commissions of the peace, in their present form, we conceive that there is, in effect, a legislative acknowledgment of their validity. At the same time, we do not say that these instruments might not have been framed with more care; so as to exclude the doubt, which might perhaps be raised whether a Court of Quarter Sessions could or not, by the terms used, be holden before one Justice only. If it could, by those terms, the question would then arise, whether a Court so holden could be deemed legally constituted, and competent to the exercise of the ordinary powers and jurisdiction, of Courts of Quarter Sessions. It may be observed that the statutes of Edward III, authorising commissions to Justices to hear and determine, do not prescribe the number of Justices to be assigned for that purpose. That was a matter settled by the Commission, in the particular clause conferring that power.

The fourth objection is that on which the question of most difficulty arises. Our opinion on it, however, is: First, that Courts of Quarter Sessions have jurisdiction in cases of fraudulent insolvency; and secondly, that even if they have not, yet a justice out of Sessions has jurisdiction to examine into the guilt of the party charged, and to apprehend and hold him to bail, as in any other case of misdemeanour. As to the latter point, the distinction between a jurisdiction for trial and one for inquiry was certainly doubted by Mr. Justice *Wightman*, though that question was not decided in *The Queen v. Bartlett* (22). But in *Com. Dig., Justices of Peace*, B. 2, and *Bac. Ab., same title*, E., it is laid down that the Justices have not authority to try treason or misprision of treason, or præmunire, yet they may in such cases apprehend and commit. So, in *The King v. Kimberley* (23), it was decided that a Justice could commit for a murder done in Ireland. Nor is it

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unimportant to observe that if a Justice of the Peace can only inquire in cases, where he can also try, unless it be for a breach of the peace or some offence tending thereto, there will in this colony be many instances in which offences will escape punishment. The Attorney-General no doubt has power to prosecute, and this Court in certain cases may sanction a prosecution. But neither the one nor the other can procure testimony or compel a single witness against his will, to disclose the necessary facts. Supposing, however, that Justices can only inquire in such cases, or where they can also hear and determine, the next question is whether the position in 4 *Bl. Com.*, 271, that the Quarter Sessions cannot try any newly-created offence, without express power given them, be correct. The cases cited in support of that position are *Regina v. Yarrington* (24), *Rex v. Buggs* (25), and *Regina v. Smith* (26). Now, in the first of those cases, the offence was forgery at the common law, so that the dictum respecting the jurisdiction of the Sessions over offences created by Statute, was extrajudicial. The other two cases prove too much, for in them the offence was not indictable at all. In each of those the offence was created by a Statute, which in the prohibitory clause specified another remedy. That remedy, therefore, and no other, was the one to be pursued. 1. *Saund.*, 135, note 4, and note 9 in V. Williams' edition. For the same reason the cases of *Rex v. Clough* (27), *Rex v. James* (28), and *Rex v. Alsop* (29), appear to us to be equally inefficacious to establish the position cited. In one or more of the Statutes, on which the last-mentioned cases were decisions, though the penalty was in the prohibitory clause, the method of proceeding for it was in a subsequent section. According, therefore, to the text in *Arch. Crim. Pl.* 2, an indictment would lie. But having carefully examined the authorities, which are referred to for that position, we find that they fail to sustain it. We take the true rule to be as laid down in *Dick. Q. S.*, by *Talfourd*, 129, that the Sessions may try offences created since the institution of such Courts, unless the trial be expressly given to some other Court, *Com. Dig., Justices of Peace*, B. 3. For that reason they could not try forgery against the 5 Eliz., c. 14; that statute having limited the trial to Justices of Oyer and Terminer, 2 *Inst.* 103. This will explain the decision in *Rex v. Bristol* (30), where the offence was, the not having taken the oath of allegiance, or the sacrament. For, by the statutes creating those offences, the jurisdiction over them was similarly restricted. That the Quarter Sessions can try all *felonies*, though newly created, has never been doubted,

(24) 1 Salk. 406. (25) 4 Mod. 379. (26) 2 Ld. Ray. 1144; 2 Salk. 680.
(27) 5 Mod. 149. (28) 2 Strange 1253. (29) 4 Mod. 51. (30) Sayer 138.

and for the position that they cannot equally try *misdemeanors* (those, at any rate, which are within the terms of their commission, expressly or by reasonable intendment), merely because they are newly created, no satisfactory reason can be given.

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If the offence be not excluded, because of its being newly created, the remaining question is—whether it be so by reason of its having no tendency (assuming that it has no such tendency), to a breach of the peace. To show that the Quarter Sessions have jurisdiction, only, in cases of misdemeanor, where there is such a tendency, the cases of *Butt v. Conan* (31) and *The Queen v. Bartlett* (32) were strongly pressed on us. In the former, the ground of the decision that a Justice can commit, in cases of libel, was certainly put on the ground of their having that tendency. And in the latter, the Judge undoubtedly intimates an opinion, that the Sessions had no jurisdiction in cases of perjury (that is, at the common law), because that crime had no tendency to a breach of the peace. The present, however, is a case of fraudulent removal of goods, to the injury of creditors. It would be impossible to say, that such an offence was not a trespass, in the strict sense of the term, and very difficult to maintain, that it was not quite as much a personal wrong, and calculated to excite a breach of the peace, as a cheat a conspiracy, or a solicitation to steal. Yet these, it is clear are all within the jurisdiction of the Sessions. The last was held to be so, after solemn argument, in *The King v. Higgins* (33), and the words of Lord *Kenyon*, in that case, are remarkable. “I am clearly of opinion, that this is indictable at the Quarter Sessions, as falling in with that class of offences, which being a violation of the law of the land, have a tendency, as it is said, to a breach of the peace; and are therefore cognizable by that jurisdiction. To this general rule, there are indeed two exceptions; namely, forgery and perjury. Why excepted, I know not; but having been expressly so adjudged, I will not break through the rules of law. No other exceptions, however, have been allowed; and therefore this falls within the general rule.” That the Sessions have jurisdiction over conspiracies, was decided in *The King v. Rispol* (34). Lord *Mansfield* there said—“The cases of perjury, forgery, and usury, stand on their own special grounds. This offence of conspiracy is a trespass; and trespasses are indictable at Sessions, though not committed *vi et armis*.” The word trespass is said by *Hawkins*, to include all inferior offences that are against the peace, either directly or by construction. 2 *Hawk. P.C.* cap. 8, s. 38. So

(31) 1 Brod. & Bing. 573. (32) 1 Dowl. & L. 105. (33) 2 East 18.

(34) 1 Wm. Bl. 368.

1847. according to *Coke*, in his commentary on the Statute of Westminster second, trespass may be taken to mean any outrage or misdemeanor. 2 *Inst.* 419. Accordingly, in *Talfourd's Dick Q.S.* the law as to the Sessions jurisdiction is thus laid down. "In the result it appears that the Quarter Sessions have power to try all indictable offences, whether offences at common law, or created by Statute; with the exception of treason, misprision of treason, præmunire, forgery, and perjury at common law, and perhaps usury. The three last exceptions do not admit of being referred to any principle, as the reason assigned, that they do not *directly* tend to produce breaches of the peace, will equally apply to many other offences, over which the Sessions have undoubtedly jurisdiction." The summary thus given, it appears to us, is supported by the language of the Statutes, 18 Ed. III, c. 2, and 34 Ed. III, c. 1, which gave rise to the powers, in fact, exercised by Justices in Sessions. By the former it was enacted, "that certain persons in each county should be assigned, to hear and determine *felonies and trespasses done against the peace*." By the latter, the persons assigned to keep the peace (it is enacted) shall have power to restrain offenders, and to pursue and arrest them, and also to hear and determine, at the King's suit, *all manner of felonies and trespasses*" done in the county. The difference in the terms used, as to this point, in the two Statutes have not (that we know of) been before noticed; but we think it most material. The enactments are each *in pari materia*, and the one provides for a jurisdiction, only, over trespasses against the peace;—the other gives or provides for a jurisdiction, over "all manner of trespasses." The distinction having been thus made, we are of opinion that, by force of the last-mentioned enactment (and looking at the terms of the commission, which extend to *all trespasses whatsoever*, in connection with it), not only trespasses strictly against the peace, or having a tendency to a breach of the peace, but all trespasses in the largest sense, being against the peace by construction and intendment only, are within the jurisdiction of Justices of the Peace, in and out of Sessions. This mode of construction is adopted on the authority of *Hyde v. Johnson* (35), which we have followed on other occasions. The conclusion at which we have arrived, however, in favour of the jurisdiction, may, in our opinion be supported without reliance on the argument drawn from that construction.

On the whole case, the result is as follows. We think that the excellent magistrate, against whom the application is made, considering

the doubts suggested, was justified in desiring the opinion of this Court to be taken, on a point of certainly no small difficulty. But that opinion is, that he has the jurisdiction which he was requested to exercise; that the prosecutor was entitled, on his declining to proceed with the enquiry, in the usual course, to apply to this Court for its interposition; and that the mandamus asked for, must consequently go. The rule for the writ, therefore, is made absolute.

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Rule absolute.

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POLACK v. MILNE. (1)

June 12.
Stephen C.J.
Dickinson J.
and
Therry J.

*Scire facias on a judgment—Joint contractors—contribution—4 Vic., No. 6,
secr. 17 & 23.*

Declaration in *sci. fa.* against defendants as joint contractors with S. & S. against whom a judgment had been obtained, which was still unsatisfied, to recover execution, under 4 Vic., No. 6, sec. 17. *Held*, on demurrer, that a plea denying that the damages are still unsatisfied is bad, for traversing the non-payment which was prematurely alleged in the declaration.

A plea denying that S. & S. were authorised to do the act for which damages had been given, and that defendants had any opportunity to defend the said action, no fraud being suggested, is bad.

A plea that the plaintiff had been paid and satisfied and was collusively, and at the instance of S. & S., bringing this action to recover a contribution from the defendants for the benefit of S. & S. is bad, the facts averred showing nothing deceitful or fraudulent. The Court will not on objections entered by the defendant in the demurrer book, to the declaration, allow the defendant to question the propriety of the judgment before obtained.

THE reserved judgment in this case was delivered, on June 12, by,—

DICKINSON, J. This was an action in a *scire facias* brought by the plaintiff to recover from the defendant execution of a judgment recovered in an action of trover, against *Alexander Brodie Spark* and *Thomas Shadforth*, as members of a certain co-partnership, carrying on business in the said colony of New South Wales, under the name and style of the General Steam Navigation Company, who were sued in such action as such members as aforesaid, for and on behalf of the said co-partnership, according to the form and effect of a certain Act of the Governor and Council of our said colony, made and passed in the fourth year of our reign, and intituled "An Act to consolidate and amend the laws relating to actions against persons sued as joint contractors," for the conversion by the said co-partnership of the plaintiff's goods. The declaration further alleged, that the damages were then unpaid and unsatisfied, and that the defendant at the time of the conversion was a member of the said co-partnership.

To this declaration the defendant pleaded, thirdly, That the damages did not still remain unsatisfied. Fourthly, that the said alleged conversion by the said co-partnership was not a conversion by him nor one to

(1) *The Sydney Morning Herald*, April 17, June 14, 1847.

which he was party, nor one authorised or assented to by him or by the said co-partnership ; and that he had no notice nor any knowledge before the recovery of the said judgment of the plaintiff having brought the action, or any opportunity whatsoever of making a defence to it. And fifthly, That the action was brought by the plaintiff for a conversion for which he was not liable, as the plaintiff and *Alexander Brodie Spark* and *Thomas Shadforth*, at the time of the commencement of the action, and of the recovery of the said judgment, and of the payment and satisfaction in the plea after mentioned, well knew ; and that after the recovery of the said judgment, and before the commencement of the suit on the *scire facias*, the plaintiff was paid and satisfied the damages for the said conversion by some person whose name was to him unknown, and that afterwards the plaintiff, well knowing the premises in that plea mentioned, and then having no further interest whatsoever in the said judgment, fraudulently and deceitfully, and by connivance with *Alexander Brodie Spark* and *Thomas Shadforth*, as members of the said co-partnership, and to the said person whose name was to him unknown, and with divers other persons whose names were respectively unknown to him, did suffer and allow the *scire facias* to be issued upon the judgment against this defendant, and to be served upon him in order that a portion of the amount of the said damages and costs might be obtained from him, as a member of the said co-partnership as by way of contribution, he not being liable to contribute, and with intent to benefit *Alexander Brodie Spark* and *Thomas Shadforth*, as such members as aforesaid, and the said several persons whose names were to him unknown, and not to benefit the plaintiff.

The plaintiff demurred to the third, fourth, and fifth pleas, for the causes (among others) noticed in our judgment ; and the defendant in the demurrer book gave notice that he should object to the declaration in the *scire facias*, because it showed that the original judgment was wrongly entered up for the plaintiff, for a cause of action for which the co-partnership never could never have been liable under the local Act hereafter mentioned.

In the demurrer book the defendant gave notice that upon the argument he would object to the sufficiency of the declaration, upon the grounds that it did not show any liability on his part to pay the damages recovered in an action of tort against *Spark* and *Shadforth*, that it did not show that *Spark* and *Shadforth* were sued as joint contractors, and that it did not appear that the name of the defendant as an actual partner of the said co-partnership was at any time unknown to the said

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1847. *Abraham Polack*, or otherwise unknown ; and that it did not show that this defendant was a member of the said co-partnership at the time of the said conversion, and that was quite consistent with the allegations in the declaration that the defendant never authorised either expressly, or by construction of the law, the commission of the said tort by the said co-partnership, and that this defendant first became a member of the General Steam Navigation Company on the day that judgment was recovered against the said *Alexander Brodie Spark* and *Thomas Shadforth* ; and that the defendant did not in so becoming a member of the said co-partnership contract any liability either for breaches of contracts or torts previously committed by the said co-partnership.

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The plaintiffs seek to charge the defendant in execution upon this judgment against *Spark* and *Shadforth*, by virtue of the local Act, 4 Vic., No. 6, sec. 17 and sec. 24.

The 17th section is thus worded : " And whereas in some cases business is carried on in the said colony by persons in co-partnership, or by one individual or more assuming the style of a co-partnership, or acting as agent or agents for a co-partnership, and in some of these cases the names of the actual members of such co-partnership, or of some of them, are, or may be unknown, and in order to prevent any failure of justice in such cases : Be it enacted, that every such co-partnership, and the several members thereof, or the persons or person having carried on business under the style of any such co-partnership, may be sued in any action at law in the name or names of any one or more of the members of such co partnership, on behalf of all the members composing the same, or in the name or names of such agent or agents for and on behalf of such co-partnership, so as that in all cases wherein it would have been necessary, if this Act had not been passed, to mention the names of all the members composing any such co-partnership, it shall be sufficient to mention only the name or names of such one or more member or members, or of such agent or agents on behalf of such co-partnership ; and every judgment obtained in any such action shall have the same effect and operation upon the property, both real and personal, of such co-partnership, and also upon the property and persons of the several members thereof, when discovered, whether such property be joint or separate, as if every member of such co-partnership had been actually and in fact a defendant in the action."

Section 23 is : " And be it enacted that nothing in this Act contained shall extend to any action of trespass or other action in tort (trover or detinue excepted) but to actions on or arising out of contract only.

The demurrers were argued last Term by Mr. *Broadhurst*, for the plaintiff, and Mr. *Fisher*, for the defendant. Mr. *Broadhurst* cited *Bradley v. Eyre* (2); *Simpson v. Lord Howden* (3). Mr. *Fisher* cited *Phillipson v. Tempest* (4); *Bradley v. Urquhart* (5); *Bosanquet v. Ransford* (6); *Phillipson v. Lord Egremont* (7).

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We are of opinion that the third plea is bad, for traversing the payment which was prematurely alleged in the declaration. *Hollis v. Palmer* (8). The plea of payment must necessarily be one in confession and avoidance, as it never could have been pleaded at all before the Statute 4 and 5 Anne, c. 16, section 12. Had the averment of non-payment of damages been requisite by common law in the declaration of the *scire facias*, the defendant would have wanted no statutory aid to enable him to traverse such an allegation. The allegation of payment was therefore unnecessarily made in the declaration upon this *scire facias*.

We are of opinion also that the fourth plea is bad. By that plea he admits he was a partner at the time of the conversion, and by the local Act the whole partnership became the defendants in the action. We think, therefore (as the plea suggests no fraud upon him), the defendant cannot be admitted to say he had no opportunity of defending the original action, not to aver the other matters in the fourth plea contained, inasmuch as they would have been good defence to the last-mentioned action.

We think, moreover, that the fifth plea is bad. It states that the action was brought for a conversion for which the defendant was liable, as the plaintiff and nominal defendants in the suit well knew. (a)

The fifth plea appears to have been framed on the model of one of the pleas in *Phillipson v. Lord Egremont* (9). In that case a plea, that the original action was brought against the registered officer for a demand, in which neither he, nor the defendant, nor the company, was by law liable, and that such registered officer and the plaintiff well knowing the premises, the registered officer fraudulently and by connivance with the plaintiff, suffered judgment by default, in order and with intent that the plaintiff might sue for and recover the amount against the defendant was held good. But it appears to us that for aught that appears in the fifth plea, *Spark* and *Shadforth*, may have honestly

(2) 11 M. and W. 432. (3) 9 Cl. and Fin. 61. (4) 1 D. and L. 209. (5) 11 M. and W. 456. (6) 11 A. and E. 520. (7) 6 Q. B. 587. (8) 2 Bing. N.C. 713. (9) 6 Q. B. 587. (a) ? Not liable.

1847. defended the original action for the benefit of the co-partnership upon the very ground alleged by the defendant ; that being unsuccessful in that defence, and the co-partnership and the defendant having become liable to a writ of execution, some friend of *Spark* and *Shadforth*, in order that they should not individually bear the whole loss in the first instance, but that the defendant should at once contribute his share towards the common calamity of his partnership, bought the plaintiff's judgment, and used his name in the *scire facias* against the defendant. Such an argument, we think, would not be wrong in itself, and cannot be worse, because the defendant in his fifth plea calls it a connivance, and without the averment of other facts than those mentioned in the fifth plea, we see nothing fraudulent or deceitful in it; and the assertion that there is fraud and deceit, without facts to show those incidents, we think, amounts to nothing. We are, therefore, of opinion that the fifth plea is insufficient.

As to the objections to the declaration, they might have been sufficient to induce the Court to have arrested the judgment, or they may now be valid to induce the Court of Appeal to reverse it, but this Court having given its judgment, cannot have its propriety questioned in the proceeding which it has taken to enforce it. The judgment of the Court is therefore for the plaintiff.

Demurrer upheld.

POLACK v. TOOTH. (1)

1847.

Sci. fa. on judgment—Plea of Judgment satisfied by payment—Cheque for smaller sum—4 & 5 Anne, c. 16, sec. 12.

July 30.
Stephen C.J.
Dickinson J.
and
Therry J.

A plea to a declaration, in *sci. fa.* on a judgment, that after the recovery of the judgment the defendant delivered to the plaintiff a cheque to the full satisfaction thereof is bad.

Accord and satisfaction is not pleadable to an action on a judgment.

The statute 4 and 5 Anne, c. 16, sec. 12, has only made payment of the *whole* of the debt a defence.

THIS was a demurrer to the defendant's plea to a declaration, in *scire facias* on a judgment. The plea stated that the defendant gave to the plaintiff a negotiable cheque upon a bank, in satisfaction and discharge of a large amount claimed by the declaration. To this a demurrer was filed, assigning as grounds, that a smaller sum was pleaded as paid in satisfaction of a greater, without any circumstances stated to show that the smaller sum could be taken in satisfaction of a judgment debt; nor was it averred that the cheque was paid.

Broadhurst, in support of the demurrer. 5 *Coke*, 117, and 1 *Strange and Smith's Leading Cases*, 146.

Fisher, in support of the plea. *Baker v. Walker* (2); *Walters v. Smith* (3); 3 *Burr*, *Chitty on Bills*; and *Sibree v. Tripp*. (4)

Cur. adv. vult.

The judgment of the Court was delivered by—

Aug. 18.

THE CHIEF JUSTICE. The question in this case arises on a demurrer to the plea. The declaration in *Scire Facias* on a judgment, states the recovery by the plaintiff of the sum of four thousand six hundred and eighty pounds, in an action of trover against a company; of which the defendant was then, and at the time of the conversion, a member. To this the defendant pleads, that after the recovery of the judgment, he delivered to the plaintiff, who then accepted from him, a certain negotiable instrument called a *banker's cheque*, payable to bearer, for the sum of seventy-eight pounds, in full satisfaction and discharge of the money

(1) *The Sydney Morning Herald*, July 31, Aug. 19, 1847. (2) 14 M. & W. 465.
(3) 2 B. & Ad. 889. (4) 15 M. & W. 23.

1847. so recovered. The plaintiff demurs specially—for reasons of which it is necessary to mention two only; first, that accord and satisfaction merely, is not pleadable to a declaration on a judgment; and, secondly, that even supposing the cheque to have been *paid*, which was not alleged, the payment of a smaller sum cannot, without special circumstances shown, operate in law as satisfaction of greater.

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On the argument, Mr. *Broadhurst* contended for the plaintiff, that to a *scire facias* on a judgment, payment itself was pleadable, only, by virtue of the Statute 4 and 5 Anne, c. 16, s. 12; and that that enactment applied, solely, to cases of payment of the *whole* sum, but that the payment of a less sum, or delivery of something representing a less sum, in *satisfaction* of the whole, was clearly no defence. In answer to this, Mr. *Fisher* for the defendant relied on the case of *Sibree v. Tripp* (5), which, he maintained, was a decisive authority in his favour.

We have looked into that case; and we are of opinion, that it has no application to the present. That was an action on a promissory note, and also for money had and received, and on an account stated. To the latter counts the defendant, pleaded that an action had previously been brought for the same money; that he then disputed the claim, and denied owing the money; and that, to settle such dispute, and finally to determine the action, the plaintiff agreed to receive certain promissory notes, payable to order; which the defendant accordingly gave, and the plaintiff then took, in full satisfaction and discharge. The Court held, certainly, that the plea was good; notwithstanding that one of the notes remained in fact unpaid, that none were in the plea alleged to have been paid, and that the whole, had they been paid, were unitedly for an amount considerably less than that, in liquidation of which they were given. Nothing more was thereby decided, however, than that the acceptance of a negotiable security may be pleaded, in satisfaction of a debt due on a *simple contract*. It is not quite clear, indeed, that the case is a distinct authority, even to that extent. For, although Baron *Parke* rests his judgment alone on the acceptance of the notes (which, he conceives, being things of uncertain value, and therefore possibly greater than the amount claimed, are on the footing of *chattels*, and so receivable in satisfaction of a debt to any amount), and he throws out of consideration, therefore, the circumstance of the claim having been *disputed*, the other Judges appear to have sustained the plea, partly on two grounds; that is to say, not alone because the satisfaction was by a negotiable security, but because the matter satisfied

was one disputable, and in fact disputed between the parties, and therefore a justification of the compromise, or arrangement for liquidation entered into. (See judgment of *Pollock, C.B.*, p. 32, and of *Baron Alderson*, p. 38.)

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But, assuming the decision to be as supposed, that a negotiable security for a less sum may be a satisfaction of a liquidated and admitted debt, to a greater amount, and assuming that a banker's cheque is a security of that nature, it is no authority for the plea in this case, which is pleaded to an action on a *specialty*. Baron *Parke* expressly confines his judgment, in *Sibree v. Tripp*, to the satisfaction of debts on simple contract; and says:—"In the case of a contract under seal, it is different. If the contract be by bond, or covenant, it can be determined only by something of an equal or higher nature" (p. 34). Now, a judgment debt is of higher degree, in the course of administration, than a bond debt; and therefore, *à fortiori*, the acceptance by parol; or agreement in writing, of a thing of uncertain value, cannot be a satisfaction of a judgment debt. In 2 *Saund.* (edit. by *Vaughan Williams*) p. 72, *c.c.*, the matters are enumerated, which may be pleaded to a *scire facias* on a judgment; and no such defence as that here relied on is among them. At the common law, even the acceptance of the whole debt could not have been so pleaded, by reason of the different degrees of the debt, and the satisfaction. And we think, that all which the Statute of Anne has done is to alter the law in that respect; and make payment of the *whole* a defence—but not the payment or receipt of a part, pleadable. We are of opinion, therefore, that the plea in this case is bad; and the plaintiff consequently is entitled to our judgment.

Demurrer upheld.

1847.

BORTHWICK v. BINGLE. (1)

April 23.
 Stephen C.J.
 Dickinson J.
 and
 Therry J.

Trespass—Plea of depasturing license from Crown.

In an action for trespass on certain Crown lands in the possession of the plaintiff, it was held, on demurrer to the defendant's plea, alleging that he held a depasturing license from the Crown, that the defendant must succeed, and that the license, though it gave no actual property in the land against the Crown, would convey to the holder a defeasible right to go upon the land, for the purpose of depasturing, notwithstanding its possession by any person not holding such a license.

THIS was an action for trespass upon certain lands beyond the boundaries, in the possession of the plaintiff, to which the defendant pleaded, among other things, a depasturing license from the Crown. To this the plaintiff demurred.

Lowe, in support of the demurrer. The whole effect of the license is merely to prevent the Crown from treating the holder of the license as a trespasser, and is of no avail between subject and subject.

Fisher, for the defendant. The license confers a good title upon its holder as against any wrong doer, and the Court must take judicial cognizance of a custom and practice which may be regarded as a usage of the colony.

The COURT was of opinion that the defendant must succeed. The plea admitted that the land in question was in the possession of the plaintiff, for the purpose of depasturing his stock, which would be sufficient for the purpose of enabling him to maintain trespass; but the defendant had relied upon a license from the Government as a justification for his intrusion; and this permission from the Governor to go upon the land, notwithstanding the plaintiff's occupancy, would be sufficient to justify this intrusion, provided the Governor had power to grant such a permission; and such power having been recognised both in local and imperial statutes, the Court was bound to assume its existence. The license, although it gave no actual property in this land against the Crown, would convey to the holder a defeasible right to go upon the land for the purpose of depasturing, notwithstanding its possession by any person not holding such a license.

Demurrer overruled.

(1) *The Sydney Morning Herald*, April 24, 1847.

DOE *dem.* IRVING *v.* GANNON AND ANOTHER (1) [No. 1].

1847.

Registration Act, 7 Vic., No. 16, sec. 11—"Bona fide or for valuable consideration"—
Onus probandi—Recital of consideration—On whom binding—Official assignee of
a party—Statements of Counsel in address to the jury

May 19,

Stephen C.J.
 Dickinson J.
 and
 Therry J.

The plaintiff claimed certain land in ejectment as official assignee of G. The property in question was mortgaged by the grantee P., to G., and subsequently, the mortgage being unregistered, G. procured from P. a conveyance to the defendants upon trust for the wife of G., &c., to which conveyance G. was an assenting party, the consideration for the deed being recited therein to be a general release by the wife of G. of her dower, which release was executed at the same time. The trust deed was registered and G. shortly after became insolvent.

On motion for a new trial, the verdict having been for the plaintiff, *held*, that the jury should have been directed that the trust would prevail over the mortgage deed only if made *bona fide* and for *valuable consideration*.

The *onus probandi* lay upon the defendants. The recital of the consideration in the trust deed was not binding on the official assignee of G., for he represented, not G., but G.'s creditors. A valuable consideration moving from the party to whom the deed is made, or *the party beneficially taking*, is a sufficient consideration to support the deed under the Registration Act. A Judge presiding at *Nisi Prius* is not bound to negative assertions of fact made by counsel.

NEW trial motion in an action of ejectment tried before the *Chief Justice*, the verdict having been for the plaintiff. The judgment of the Court was delivered by

DICKINSON, J. This was an action of ejectment, for lands situate in Sydney, tried before the *Chief Justice*, on the 29th May, 1846. At the trial, the facts appeared to be that upon the 24th June, 1839, the Crown granted the land to *John Jenkins Peacock*; who on the 23rd May, 1844, mortgaged it to *Michael Gannon*, now an insolvent; and of whose estate the lessor of the plaintiff is the Official Assignee.

The mortgage was made, to secure *Michael Gannon* against endorsements which he had made on *Peacock's* promissory notes, for the accommodation of the latter, to the amount of £15,000 against which, however, *Peacock* had given to *Michael Gannon* his promissory notes, to the same amount, as a further security. Afterwards, *Michael Gannon*, being in embarrassed circumstances (but before his estate was sequestrated) a deed was made between *Peacock* of the first part, *Michael Gannon* of the

(1) *The Sydney Morning Herald*, May 21, 1847. And see same case, No. 2 *post*, Sept 1, 1847, page 400.

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second part, and the defendants of the third part, by which *Peacock*, under the direction of *Gannon*, conveyed the mortgaged land to the defendants, on the trusts presently enumerated. The deed recited an alleged agreement between *Michael Gannon* and his wife, that she should have £1,500 for releasing her dower ; and that she had joined in several of her husbands mortgages, on the faith of that agreement. The trusts of the deed were, first to Mrs. *Gannon* for her life, and then to her husband for life, unless he should become insolvent, have an execution against him, or should alien the land, in either of which events, it should pass to the trustees, for the children, and other purposes. After his own and his wife's death, the property was limited to the children in such proportions as *Michael Gannon* and his wife or the survivor should appoint.

The latter deed was made on the 1st, and registered on the 19th July, 1844, and, on the former of these days, Mrs. *Gannon* executed a general release of her dower, in all her husband's lands. Previously to the execution of the trust deed, *Michael Gannon* had executed several mortgages of portions of his property, for sums amounting to £4,800 ; and after the making of that deed, he executed mortgages of other portions for sums amounting to £3,900. The marriage of *Michael Gannon* with his wife was proved. It appeared, that *Michael Gannon* was in 1843 and 1844 in embarrassed circumstances ; and that his estate was ordered to be sequestrated, and the lessor of the plaintiff appointed his official assignee, on the 26th day of February, 1845.

In summing up the case, the *Chief Justice* told the jury that, by reason of the Colonial Registry Act, the trust deed would prevail against the mortgage, if the former was made *bona fide* or for valuable consideration ; but that the burden of proving either of these, lay upon the defendants. His Honor said, that he saw no proof of consideration for that deed, beyond the recitals in and endorsement on it, drawing attention to the fact, that that deed was executed by *Peacock*, and not by *Gannon*, and he left it to the jury to say, whether there was any *mala fides* shown in the transaction. The jury delivered a verdict for the plaintiff.

A new trial was moved for in the last term, on notice, on the following grounds : 1st. That the verdict was against evidence. 2nd. Because the Judge told the jury that the burden of proving *bona fides* or valuable consideration, lay on the defendants. 3rd. Because His Honor said, that he saw no evidence of consideration, beyond the recitals in and the

receipt upon the deed. 4th. Because His Honor did not negative Mr. Foster's assertion, that the promissory notes of Peacock were only waste paper.

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The several points were argued by Mr. Windeyer and Mr. Broadhurst for the defendants. They cited *Sugden*, V. & P. 295; *Callaghan's Statutes*, 1045; 1 *Saunders* 235 b.; *Scott v. Surman* (2); and *Baker v. Dewey* (3); for the plaintiff, Mr. Foster and Mr. Fisher cited *Doe v. Ball* (4); and commented on the wording of the Registration Act.

We have considered this case and the arguments urged, and we are of opinion, first, that the jury should have been directed, that the trust would prevail over the mortgage deed, only, if made *bona fide and for valuable consideration*. As it was admitted in argument, that (whether the words "*bona fide or for valuable consideration*" in the Registry Act ought to be construed "*bona fide and for valuable consideration*" or not, yet by virtue of other enactments,) the direction should have been in this form, we need say no more on the point, but that we are satisfied the direction should have been as we have stated, although the words of that Act, taken by themselves, warrant the instruction which was given.

Secondly. We are of opinion that it rested with the defendant to show that the trust deed was made *bona fide and for valuable consideration*. The Act provides, in effect, that a subsequent, registered before a prior deed, shall prevail against it if so made, but not otherwise. The plaintiff having established his case by showing the mortgage it was obviously for the defendant to show not only that the subsequent trust deed was registered before, but that it was made under circumstances which would defeat the mortgage.

Thirdly. We are of opinion that the recital in the trust deed and the endorsement thereon, were not evidence against the plaintiff. Doubtless, when a statement is made in a recital and a contract is made with reference to this statement, it is not competent to the parties, or their privies, to deny that statement. *Carpenter v. Buller* (5); *Co. Litt.* 352 a. But such recitals do not bind the assignee of one of the parties who has become insolvent, inasmuch as the assignee comes in not *under or by*, but over and in despite of, the party insolvent, and represents not him but his creditors (see *Doe v. Ball*) (6), for whom, and not for the insolvent, he holds the property. We think, nevertheless, that as it was proved that

(2) Willes' R., 402. (3) 1 B & C. 704. (4) 11 M. & W. 531.
(5) 8 M. & W. 209. (6) 11 M. & W., 531.

1847. *Gannon's* wife, on the day the trust deed was executed, released her dower in the lands thereby conveyed to the defendant, there was some evidence, *dem.* *dehors* the deed, that a valuable consideration passed from her, who was IRVING to be benefited by it.
" GANNON.

Dickinson J. In saying that there was no other evidence of consideration than in the deed and endorsement, the Chief Justice referred to a consideration moving to *Peacock*, the party making and executing that deed. We are of opinion, however, that notwithstanding the words "*made or executed* for a valuable consideration," in the Registration Act, a valuable consideration moving from the party to whom the deed is made, or the party *beneficially taking*, is a sufficient consideration to support that deed. There was evidence, therefore, to go to the jury of consideration ; and as His Honor's observation on this fact was consequently incorrect, we think it safer that there should be a new trial. *Davidson v. Stanley* (7). For the remark might possibly have induced the jury hastily to infer fraud, without due consideration of the other circumstances.

We are of opinion, however, that the verdict was not against evidence ; as the unusual way in which the deed was made, for the wife's benefit, the limitations in that deed for *Gannon's* personal benefit, and the evidence as to his affairs, about the time when the deed was executed, would warrant the jury in inferring that it was made in fraud of his creditors. The fraud would, moreover, prevent the joinder by *Gannon* in the trust deed, from operating (as Mr. *Windsyer* contended it did) as a surrender of the mortgage.

Fourthly. We are of opinion that the *Chief Justice* was not bound to negative the assertion of fact made by Mr. *Foster*. We conceive that a case is properly left to the jury by the Judge explaining to them the questions for decision and the law which governs those questions, and then laying before them the evidence. We think that the Judge is entitled to give his opinion on the facts, but is not called on to refute counsel's arguments or to negative their assertions, unless he shall himself think fit to do so.

New trial granted.

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Murder—Conjoint causes of death laid in indictment—Effect of opinions of English Judges.

June 12.
Stephen C.J.
Dickinson J.
and
Therry J.

The information in this case having charged the prisoner with causing the death of another person by blows and by throwing the deceased to the ground, the Judge told the jury that it was not necessary for them to be satisfied that the deceased died from the conjoint operation of the two causes of death assigned, but that, if they found that the deceased died from either of the two, both acts being clearly proved to have been done by the prisoner, that was sufficient. *Held*, that, in deference to the *opinions* of English Judges, the jury should have been directed to acquit, unless they thought the death was the result of the *combined causes* alleged.

CROWN case reserved by His Honor Mr. Justice *Therry*. The *Attorney-General* for the Crown, Mr. *Darvall* for the prisoner. The following are the reserved judgments of the Court in this case :—

The CHIEF JUSTICE. The prisoner *Francis Morley* was convicted, at the present Criminal Session, before Mr. Justice *Therry*, of the murder of *Eliza Moss*. The information charges that the death was caused by divers mortal wounds, contusions, and bruises on the deceased's head, stomach, back, and sides, sustained by the prisoner's having, with his hands and feet, *cast and thrown the deceased to and against the ground*, and then and there, with his hands and feet, *beaten and kicked her while so on the ground*. The Judge told the jury that it was not necessary for them to be satisfied that the deceased died from the *conjoint operation of the two causes of death assigned*; but that, if they found that the deceased died from either of the two (both acts being clearly proved to have been themselves the acts of the prisoner), that was sufficient. The question for our opinion is, whether that decision was right.

I have conferred with my colleagues on this question, and with them considered the two cases (those of *Stockdale* (2) and *Starling* (3), out of which the doubt in this case has arisen. I have considered the cases, also, of *Martin* (4), and *Saunders* (5), and have this day heard the arguments of the *Attorney-General*, and of the prisoner's counsel, and I am of opinion, that as the injuries charged to have been received are all of the same nature, and capable of being produced by both or either of the two acts of the prisoner, to which they are by the information

(1) *The Sydney Morning Herald*, June 7 and 15, 1847. (2) 2 Lewin 220.

(3) *S.M.H.*, June 7, 1847 (4) 5 C. & P. 129. (5) 7 C. & P. 277.

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attributed, the mode of the death was truly charged, whether it in fact arose from the falls occasioned by the prisoner, or from the kicks and blows (or either of them) inflicted by him. I think, therefore, that the judge's charge was in point of law correct.

Inasmuch, however, as two learned English judges have recently, in a similar case, acting on the reported impression of another very learned judge, thought it right to direct the jury to acquit unless they thought the death was the result of the *combined causes* alleged, and Mr. Justice *Dickinson* is of opinion (for reasons which he has communicated to Mr. Justice *Therry* and myself, and which he is about to express openly), that the safer or more correct charge would have been, that the jury should convict, only, in case they found the death to have been produced, conjointly, by the two assigned causes, I cannot but say, that the question must be regarded as at least one of doubt, and that I conceive, under such circumstances, the sentence of the law should not take effect on this prisoner. In this view, Mr. Justice *Therry* entirely concurs, and the consequence will be, that sentence of death will be recorded only, and that the man's pardon will be recommended, on condition of his being transported for life. We shall afterwards take the necessary measures for obtaining the opinion of (if possible) the English judges, or at all events of the Attorney and Solicitor General of England, as to the proper charge in cases of this nature, and, if the opinion be in the prisoner's favour, he will then be recommended for a pardon immediately.

DICKINSON, J. According to my present means of reference, I am of opinion that the learned judge would have acted more safely in directing the jury to consider whether or not they thought the death had been caused or not by the conjoint influence mentioned in the indictment, and to find their verdict guilty or not guilty accordingly.

Had I tried the prisoner before the decision of Mr. Justice *Vaughan Williams* came to my notice, I should have probably instructed the jury in the same way as my learned colleague, Mr. Justice *Therry*, did. The direction of His Honor appears so reasonable, that a doubt of its propriety would scarcely arise in the mind of any person whose attention was not specifically pointed to the difficulty under our present consideration. The direction is virtually sanctioned by the opinions of two judges in England, Mr. Justice *Cresswell* and Mr. Justice *Vaughan Williams*. But the last named learned judge (most probably with the advice and concurrence of Mr. Justice *Cresswell*) did not, in the case referred to, act upon the opinion of his colleague and himself, but

yielded to the *inclination* of Mr. Justice *Patteson's* opinion in *Stockdale's* case (6), and directed the jury, as I have before suggested the jury in this case should have been instructed.

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It appears to me that a colonial Court should always follow in the footsteps of the English judges along those paths which they have indicated. Where English decisions are conflicting, the inferior tribunals must adhere to that adjudication which they consider most preferable in principle.

In the *Queen v. Starling* and others reported in the *English Morning Herald*, of December 12th, 1846, and in the *Sydney Morning Herald*, of June 7th, 1847, it was laid in the indictment that death was occasioned by the stomach of the deceased having come in contact with the knees of the prisoner, and by his having been beaten and thrown to the ground. The indictment in that case therefore charged that the death was occasioned by *two* sets of contusions effected by two different means. In the case before us, the indictment charges that the death was occasioned by *two* sets of contusions effected by two different means. For the indictment states "that the prisoner, with both his hands and feet, cast and threw the deceased to and against the ground, and that while she was so on the ground, the prisoner struck and kicked her with his hands and feet, giving to the deceased *as well* by the casting and throwing her to the ground, *as also* by the kicking and beating aforesaid, several mortal wounds, bruises, and contusions." The English case before mentioned seems to me parallel with that now before us.

But it may be suggested that the decision of Mr. Justice *Williams* is inconsistent with the cases where it has been held that although the means of killing must be stated in the indictment, the means proved need only correspond in *substance* with such statement—thus if the death is alleged to be by stabbing with a *dagger*, evidence that the death was occasioned by a knife, sword, or any other instrument by which stabbing might be effected, is no variance from, but supports the indictment. So if the death be laid to be by one kind of poisoning, and it turns out to be by another. So where a prisoner is charged with suffocating another by compressing the throat of the deceased with his hands, evidence that the prisoner effected the suffocation by compressing the mouth and nostrils is no variance.

In these cases it may be said that the mortal injuries proved correspond with those alleged, and that though the instruments as alleged and

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proved are different, they each are capable of occasioning the same mortal injuries as those alleged and proved. But it appears to me that these decisions are not inconsistent with that of Mr. Justice *Williams*, unless it will be held that an indictment charging that a man sustained mortal bruises and contusions by *being beaten, and kicked by a prisoner*, was maintainable by evidence that the prisoner *cast him to the ground*, and thereby gave him mortal bruises and contusions. Now though in such a case the corporal injuries proved and laid would be identical, and the instruments (*viz.*, the fists and feet in the one case, and the *ground* in the other) proximately inducing the injuries as had and proved, are alike efficacious to the fatal result, such a case, nevertheless, differs from those said to be inconsistent with the ruling of Judge *Williams* in this respect, that though the proximate instrument of injury as laid in one case, supposed to be wielded by the homicide, in the other, it is not. In the one case the homicide impels the weapon to his victim, in the other, his victim to the instrument of death. This distinction was considered material in *Rex. v. Martin* (7). In this case A. was indicted for the manslaughter of B. by a blow of a hammer. No proof was given of the striking of any blow, only of a scuffle between the parties. The appearance of the injury was consistent with the supposition, either, of a blow with a hammer, or of a push against the lock and key of a door; it was held by Mr. Justice *Parke* (now Baron), that if the death was occasioned by a blow with a hammer, or any other hard substance *held in the hand*, it was sufficient to support the indictment; not otherwise, if it was the result of a push against the door.

The authority of the last mentioned case is, however, weakened by the fact that the Judge, in directing the jury, told them that if they should find that the death was occasioned by the deceased having been pushed against the lock of the door, *he should put the case in a train for further adjudication*, (thereby meaning probably that he should submit the case upon such finding to all the Judges), and also, because the Jury found that death was occasioned by a hammer held in the prisoner's hand. The learned Judge, however, assented to the suggestion of the prisoner's counsel, that the prisoner must be acquitted, if the Jury should be of opinion that the death was occasioned by the deceased being pushed against the lock of the door.

As therefore we have the *inclination* of Mr. Justice *Patteson's* opinion, that when a conjoint influence of different means of death is mentioned in an indictment, the allegation must be proved *in toto*. As according

to the opinion of Baron *Parke*, the parts of the conjunction laid in the indictment before us are different means of killing. As the Judges, *Cresswell* and *Vaughan Williams*, have acted according to the inclination of Mr. Justice *Patteson's* opinion.

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I think (although my judgment is disturbed considerably by the reported fact of the opinions of Judges *Cresswell* and *Williams*, being contrary to their decision, and also by the before-mentioned decisions, in the cases of stabbing, poisoning, and suffocation, and by the circumstances which I have stated as diminishing the authority of *Rex v. Martin*), that it would be safer for this Court to hold that the directions of Mr. Justice *Therry* cannot be sustained.

I think no judgment should therefore be pronounced, but that the prisoner should be set at liberty ; but as the majority of the Bench think otherwise, the Court will of course proceed to judgment.

THERRY, J. The only question for the decision of the Court relates to the mode in which I left the case for the jury. I consider that I put the case to them in such a manner as that before they could find the prisoner guilty, they must be satisfied that the deceased *Eliza Moss* came by her death from the conjoint influence of blows and falls, or either of those causes separately, both causes being averred in the information. My direction on this point was guided by the opinion I entertained that the prisoner could not be less guilty of the charge, if death were produced from one or either of these causes, than if it were produced by both. The cases of the *King v. Kelly* (8), and the *King v. Thompson* (9), decided that in an indictment for murder or manslaughter when the cause of death is knocking a person down with the fist upon a stone or other substance, the charge should be accordingly, and a charge that the prisoner, with a stone which he held in his right hand, gave and struck a mortal blow will not be sufficient, *especially if there be no statement that the prisoner knocked the deceased down*. The ground on which the Judge reserved the case was, that the indictment contained no charge of throwing the deceased down. This decision then appears to imply that if the information had gone on to state that the throwing and casting down were the means whereby death was caused, and that the evidence corresponded therewith, it would have been sufficient. It is not intimated in the judgment that it would have been fatal to the information that the prisoner was charged with causing death by the blow, though the evidence proved it to have been by the

(8) Ry. & Moo. C.C.R. 118.

(9) Ry. & Moo. C.C.R. 139.

1847. fall—if the fall had been alleged. It may be said that by requiring the
 REGINA *falls* as well as *blows* to be stated in *Kelly's case*, the Court considered that
 v. the injury inflicted by a fall was not of the same kind as an injury inflicted
 MORLEY. by a blow. In some cases no doubt the injury may be different, and where
 ·Therry J. the fatal injury was such as that it could not be inflicted by a blow, it
 may be necessary to aver the means of death to have been by a fall, but
 in most cases the injuries produced by both are of the same kind, and
 they are calculated, as the medical evidence in this fully showed, to
 produce similar appearances. It was on account of their producing the
 same kind of mischief that the medical witness (*Dr. Gleeson*) who con-
 ducted the *post mortem* examination, would not undertake to say that
 the mortal injuries were produced by either cause separately, but by
 both conjointly. This evidence, it is true, was met and in some degree
 encountered by the equally respectable testimony of *Dr. F. Campbell*,
 that the appearances might possibly be produced by blows, but that
 from the absence of appearance of external injury on the head, and
 the various surrounding circumstances described by the witnesses, he
 should rather say (and his opinion was strongly expressed on that point)
 these injuries were caused by falls; but there is in this information a
 statement of death being caused by blows, as well as by falls, and the
 Jury must, according to my direction, have been satisfied (before they
 found the prisoner guilty of the charge) that death was occasioned by
 either cause, or by both causes. No doubt it is a rule in criminal law
 that every indictment must have a precise and sufficient certainty; but
 this rule is subject to the reasonable and just qualification that where
 an offence cannot be stated with complete certainty, it is then sufficient
 to state it with such certainty as it is capable of. Thus in *Sharvin's*
 case (10) the indictment was assaulting one with a certain offensive
 weapon called a *wooden staff*, with a felonious design to rob him; and
 it proved to be with a *stone*. This was held well, upon a conference
 between the Judges, for they produce the same sort of mischief,
 namely, by blows and bruises, and this would be sufficient in an indict-
 ment for murder, East P.C. 341. The acts charged against the prisoner
 in this information are both acts of commission by him; both acts com-
 prise an assault and a striking, the one a *striking* by casting the
 deceased upon the ground, and the other a *striking* by kicks and blows
 when lying there, and both acts moreover produce the same sort of
 injuries, namely, wounds, bruises, and contusions. This is not like the
 case where if a person be indicted for one species of killing, as by
 poisoning, he cannot be found guilty on evidence of a different kind of

(10) 1 East P.C. 341.

death, as by shooting or starving; or where an indictment charges death to have been occasioned by two co-operating causes, one being a cause of *commission*, and the other of *omission*, as in the case of *Rex v. Saunders* (11), where the count stated the death to have been caused by *omitting* to give the deceased proper food, and also by *beating*. It was there held that the prisoner being a married woman was not legally responsible for omitting to provide food, and consequently that the count charging the death jointly by starving and beating was not supported. On the whole review of the cases analogous to the present, it does appear to me that all that is required is that the manner of death proved should agree in substance with that which is charged—and I am of opinion that as the manner of death here charged is that death has been caused by *blows* and *falls*, and that as these are both acts of commission which produce the same kind of injuries, namely, wounds, bruises, and contusions, if either the blows and falls conjointly, or the blows and falls alone, were proved to the satisfaction of the jury to be the violent means whereby death was caused—the information was proved. I have referred to the case of *Stockdale* (12) cited in support of the argument before Mr. Justice *Williams*, that if death had not been caused by the conjoint influences described in the indictment, the prisoner was entitled to an acquittal. So far from deciding the point, however, in the way in which the newspaper report of the *Herald* states it to be decided, the report in *Lewin* distinctly intimates that the Judge (Mr. Justice *Patteson*) declined to pronounce any decision upon it, and for this very plain and very judicious reason, that it was unnecessary to do so. In reply to the objection in *Stockdale's* case that as the first count charged the death to have been occasioned by two co-operating causes, and the evidence was limited to one, the cause of death was not proved as laid. Mr. Justice *Patteson* is reported to have “expressed (and this is the whole of his judgment in the case) considerable doubt inclining in favour of the objection; but the evidence being upon the whole too slight for a conviction, he recommended the jury to acquit the prisoner; it became unnecessary, therefore, to decide the point.” This then appears not a decision on the point, but a disclaimer of a decision. The only thing really decided was, that as the evidence was upon the whole too slight for a conviction, the Judge recommended the jury to acquit the prisoner. From the newspaper report it would appear that Mr. Justice *Williams* treated *Stockdale's* case as deciding a point which, on reference to it, it appears to me it is found not to decide—and having thus dealt with it as a ground for a decision which, from

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(11) 7 C. and P., 277.

(12) 2 Lewin, 220.

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the perusal of it, it does not, I think, supply, it is not to be wondered at that the learned judge who tried the case and the other learned Judge (Mr. Justice *Cresswell*) whom he consulted, should express their surprise at such a decision, as they deemed it to be, and that they should further express their opinion that they did not agree with it. Under such circumstances it cannot be said that it is from want of due deference to authority that I decline to adopt the dictum of a newspaper report, when I find the only authority referred to in support of it directly disclaims a decision on the point which it is cited to sustain.

As, however, I find English Judges differ in opinion from the opinion I have expressed, though the knowledge of that difference is conveyed through the imperfect channel of a newspaper report,—yet, finding that Mr. Justice *Williams* and Mr. Justice *Cresswell* are supported by the intimation of a concurrent opinion by Mr. Justice *Patteson* in *Stockdale's* case,—I think, in so momentous a case as the present, where the penalty of death follows upon judgment, we act a suitable, prudent, and decorous part, by abstaining from directing execution to be done in this case; and instead of doing so, to use the language of Mr. Justice *Park*, in the case of *The King v. Martin* (13)—“by putting the case in a train for further consideration,” in the manner suggested by the *Chief Justice*. By that course the prisoner, at no distant day, will be restored to his freedom if my direction be deemed erroneous; and if not, he will receive, if not the last and severest punishment the law can inflict, at least a large measure of punishment for his crime.

Order accordingly.

MOORE v. FURLONG AND ANOTHER. (1)

1847.

Action against magistrate and constable—Trespass—Seizure of waif—24 Geo. II, c. 44, s. 6—Larceny Act, 7 & 8 Geo. IV, c. 29, secs. 19 & 63—Warrant.

July 8.

Stephen C.J.
Dickinson J.
and
Therry J.

A cask of tallow, being a waif, was taken from the possession of the plaintiff, by a constable, one of the defendant's, who entered the plaintiff's house and seized the said cask under a warrant from the other defendant, a Justice of the Peace. Held, that although the house was a public-house, and the cask taken without resistance, on the production of the warrant, yet the subsequent act committed furnished a test of the animus with which the first entry was made, and rendered it a trespass.

The magistrate could not allege as a defence that the warrant did not contemplate the breaking and entry.

In this case the magistrate was not justified in issuing the warrant, since the requisite circumstances, under secs. 19 & 63 of the Larceny Act, 7 & 8 Geo. IV, c. 29, in the case of a waif, did not exist.

THIS was an action of trespass brought by the plaintiff against *Captain Furlong* and a constable, for committing an alleged trespass to the dwelling-house of the plaintiff, and taking therefrom a cask of tallow. The tallow in question had been found at Newcastle, being a waif, and as such, the defendant Furlong, a magistrate, issued a document in the nature of a warrant, to take possession of it. Possession of it was taken by the other defendant, a constable. The action was tried on Aug. 15, 1846, and a verdict found for the plaintiff, damages £30.

The *Solicitor-General* now moved for a new trial.

Holroyd, for the plaintiff, *contra*.

Cur. adv. vult.

HIS HONOR the CHIEF JUSTICE delivered the judgment of the Court this morning in this case, which came before the Court last week, on motion for new trial. After adverting to the pleadings, the facts of the case, and the several points made on motion for a new trial, he proceeded to state, that as to the point as to the proof of a copy of the warrant having been granted to the defendant before the action was brought, and prescribed by the Act of Parliament, 22 Geo. II, c. 44, s. 6, the proof of this should have been part of the defendant's case, and he ought to have made it out, *Price v. Messenger* (2). As to the point taken as to the trespass to the house, and to the tallow, having been made out, it had been made out at the trial by the evidence adduced, although the original entry was made without any actual breaking into the house, it

July 12.

(1) *The Sydney Morning Herald*, July 9 and 13, 1847.

(2) 3 Esp. 96.

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being a public-house, yet the subsequent act committed furnished a test as to the *animus* in which the first entry was made. The subsequent act was the getting the tallow from out of the custody, as it was alleged, of the plaintiff; the room was opened by compulsion, upon being told there was a warrant which justified the proceeding, and then the tallow was taken. Force was not used, it was not necessary; as it is, the facts are proved to constitute a breaking and entry, *Rex v. Swallow*, cited in 1 *Russ. on Crimes*, 792, and other cases there collected. As to the point made whether the magistrate had been sufficiently connected with the other defendant, so as to make him liable, the Court thought he had been; the warrant authorises the taking and seizing a case of tallow on behalf of Government, until the owner is discovered; this is given under the hand of the defendant *Furlong*. This, coupled with the affidavit, which was produced in evidence, and on which it was issued, although it does not actually authorise the breaking and entry into the premises in search of the tallow; yet, it might be argued, that it would do so; and it is not for the defendant now to say that when he issued the warrant he did not contemplate that the constable would, under the warrant, break and enter, &c.; he is therefore guilty of that which ensued from his own act. That there was an entry under the warrant the conversations at the time evidence, *M'Laughlin v. Pryor* (3). The plaintiff, too, had such a possession of the tallow at the time of the seizure to maintain this action. It was a slight possession, but still sufficient. 1 *Arch.* 482. Then, as to the questions, whether the magistrate was justified in issuing the warrant, the Court decided that he was not; under the sections 19 and 63 of the Larceny Act, a certain set of circumstances must exist in the case of a waif, before a magistrate could interfere; none of these did, it appears, exist at the time the warrant was issued; and, therefore, the magistrate had no power to issue such a document, and must take the consequences; it was unnecessary to decide whether the document itself was good or not. And, lastly, as to the damages being excessive, doubtless under the circumstances it was a case of hardship on both of the defendants, especially as their intentions were laudable, but yet they might have exercised a little more caution in their proceedings; the Court in this, as in all cases, where a jury have assessed the damages, would not disturb a verdict on this ground, unless the amount of damages given by a jury were perfectly wrong, or so gross as to shock the sense, and that was not the case here. The motion for a new trial was therefore discharged.

New trial refused.

(3) 1 Car. and Mar. 354, and 4 Scott N. R. 665.

DOE *dem.* TUGWELL v. FARRELL. (1)

1847.

[Before His Honor Mr. Justice Dickinson and a Jury of four.]

Aug. 12.

*Married Woman—Husband transported Convict—Evidence of Conviction—Indent—Dickinson J.
Femme sole.*

An indent is sufficient to prove that a person is a transported convict, though not stating the offence for which he was transported (2).

Satisfactory evidence having been given that a person was a prisoner at the time of a Crown grant to his wife, and of her conveyance in her own name to another, she must be considered a *femme sole*, and her conveyance is good.

THIS was an action of ejectment, brought to recover five perches of land, situated on the "Rocks" in Sydney.

It appeared that the lessor of the plaintiff bought of one *Hanslow*, who purchased of one *Jane Farrell*, said to be the wife of the present defendant, who at the time she parted with the property was a prisoner of the Crown for life. The grant from the Crown to the said *Jane Farrell*, the deed of conveyance from her to *Hanslow*, and *Hanslow* to the plaintiff, were proved, and also the indent, to prove that the defendant, *James Farrell*, came out to the colony a prisoner for life, in the year 1814, in the ship *The Three Bees*.

Michie for the plaintiff.

Foster for the defendant.

HIS HONOR, in summing up, told the jury that he considered the deed from Mrs. *Farrell* to *Hanslow* as a bargain and sale; and this being the case, the documentary part of the plaintiff's case had been clearly made out. And, lastly, that the indent was sufficient to prove that the defendant was a convict, though it did not state the offence for which he was transported (this was one of the objections taken to it); for it is the punishment and not the offence that shows whether a man is a prisoner for life, &c., or not. And there being satisfactory evidence, therefore, that the defendant was a prisoner at the time of the grant being made to Mrs. *Jane Farrell*, and that she conveyed in her own name to *Hanslow*, in accordance with the late Sir *Francis Forbes'* judgment in the case of *Doe dem. Smithers v. Clarke* (3) (1834) Mrs. *Jane Farrell* was in the eye of the law a *femme sole*, and could, therefore, alone convey her property.

Verdict for the plaintiff. Damages, one shilling.

(1) *The Sydney Morning Herald*, Aug. 13, 1847. (2) But see this case on motion for a new trial, *sub. nom. Doe dem. Cotton v. Farrell*, *post.*, Oct. 29, 1847.

(3) 1 S.C.R. Ap. 33.

1847.

DOE *dem.* IRVING *v.* GANNON AND ANOTHER (1) [No. 2].

Sept. 1.

*Registration Act—7 Vic., No. 16, sec. 11—Valuable consideration.*Stephen C.J.
Dickinson J.and
Therry J.

The *bond fide* execution mentioned in sec. 11 of the Registration Act should be a *bond fide* execution by those by whom the deed is made.

THE judgment of the Court, in which the facts and arguments are fully set out, was delivered by

DICKINSON, J. This was an action of ejectment by the official assignee of *Michael Gannon*, an insolvent. The plaintiff proved a grant from the Crown to one *Peacock*, and a mortgage from him to *Michael Gannon*, and the insolvency of the latter, together with the appointment as his assignee. The before-mentioned mortgage was never registered. The defendants claimed under a subsequent deed which was registered. That deed was from (not *Gannon*, the legal owner, but) *Peacock*, *Gannon* appearing by the second deed to be only an assenting or directing party. The question at the trial was, which of the two parties thus claiming under the same *Peacock* should prevail. The defendants contended that they should prevail by reason of their prior registry. The plaintiff urged that he was entitled to the verdict, as the deed to *Michael Gannon* was executed before the other, and the latter was not executed by *Gannon* *bond fide* and for valuable consideration.

At the trial it appeared that the *cestui que trust* (the wife of *Gannon*) of the second deed, in consideration of it, had executed a release of her dower in the land, and there was evidence that when the second deed was executed the affairs of *Michael Gannon* were much embarrassed. The *Chief Justice* directed the Jury that the second deed would prevail, only, *if made by Peacock bond fide, or for valuable consideration.* The Jury delivered their verdict for the plaintiff.

There was a motion made at the Banco sittings, after the last term, for a new trial, and at the hearing we disposed of all the points, in favour of the plaintiff, with the exception of one, viz., whether or not the *bond fide* execution mentioned in section 11 of the Registration Act, 7 Vic., No. 16, should be a *bond fide* execution by those to whom the

(1) *The Sydney Morning Herald*, Sept. 3, 1847. Cited 1 S.C.R. Eq. 38; D. d. Cooper *v.* Hughes, *post*, Dec. 1847; D. d. Peacock *v.* King, *post*, April, 1854; and Gannon *v.* Spinks, *post*, July, 1856, and see page 385.

deed was made? We have considered this point, and we are of opinion that the Jury were rightly instructed. At common law, a prior took effect against a subsequent deed. At this day it has the same power, unless there is some positive enactment which has altered this efficacy. The Legislature by its Registry Act has given priority to deeds, according not to the time of their execution, but to that of registration, if they are executed or made *bond fide*, &c. Now the *execution* of a deed is the act of the transferor, and vests the estate in the transferee immediately, whether he is cognizant of the transaction or not (2); and therefore the *bond fides* mentioned in the 11th section must be on the part of the transferor. If the Legislature intended that the good faith should exist in the other party to a deed, *quod voluit non dixit*.

1847.
DOE
dem.
IRVING
v.
GANNON.
Dickinson J.*

By reference to the statutes (13 Eliz. c. 5, and 27, Eliz. c. 4) against fraudulent alienations, there will be found a *special* section (viz., section 6) in favour of purchasers *bond-fide* and for valuable consideration. There is no such provision in the Colonial Registry Act, and that absence affords us another reason for our opinion, that the *bond-fides* must exist in the transferor.

Had *Gannon*, before *Irving* acquired anything by the insolvency, conveyed to the defendants, there would have still have been a question under the statute of Elizabeth, whether they could retain, for, the deed would have been a fraud on his creditors, if with intent to defeat or delay them. And so it might possibly have been, had *Peacock* had the title, and conveyed to the defendants by *Gannon's* directions. But here, *Gannon* conveyed nothing. He directed *Peacock* to convey; and *Peacock* purports to convey, accordingly. *He*, however, had nothing to convey, and consequently conveyed nothing. And *Gannon*, who had the estate, and might have conveyed, did not assume to convey, but only directed another to do so. So that, as a conveyance, it operated nothing.

Therefore, there is no conflict of titles under or dependent on the statute of *Elizabeth*. If there were, the defendants might retain (however dishonest *Gannon's* intentions), if they acquired in ignorance of those intentions, and for value. *Gannon* (without or in concert with *Peacock*) might have conveyed to the defendants *bond-fide*, and had he done so, their title would have been good. But, were the innocency or *bona-fides* of the *recipient* the test, alone, disregarding the *mala fides* and fraud of the party executing, frauds by the vendor of property would become much facilitated and encouraged.

We are therefore of opinion that the motion for a new trial must be refused.

New trial refused.

(2) See note (a) to page 701 of 2 Man. & Gr.

1847.

REYNOLDS v. TREE. (1)

Oct. 11.

Stephen C.J.
Dickinson J.
and
Therry J.

*Practice—Power of single Judge in Chambers in vacation—4 Vic., No. 22, sec. 27—
Affidavits in support—Form of the order.*

The order of a Judge in Chambers, exercising the powers of the Full Court in vacation, may be proved by the production of the original order in Court.

It is the practice of the Court to receive an affidavit, made even during an argument, as to the mere service of an order.

A foundation for the interference of a Judge, under sec. 27, 4 Vic., No. 22, must be shown by clearly setting out in the summons that it is a case of emergency, and the order of the Judge ought to bear on its face sufficient to show that he had jurisdiction.

IN this case, during vacation, His Honor Mr. Justice *Therry* had granted an order to stay proceedings in the cause, by virtue of the 27th section of 4 Vic., No. 22, which empowers a single Judge in Chambers, during vacation, in a case of emergency, to exercise the powers of the Full Court. The same Act requires the party succeeding before the Judge as aforesaid, to apply to the Court on the first day of Term, to have the order confirmed.

Foster moved that the order be confirmed.

Fisher objected, that the Judge's order was not verified by affidavit, nor was there an affidavit that the plaintiff had been served with a copy of the order.

Foster proposed to read an affidavit, not in existence on the first day of Term, to which *Fisher* objected.

The original order was produced in Court by the *Prothonotary* during the argument.

The CHIEF JUSTICE intimated that it was undoubtedly the practice of the Court, during the hearing of an argument, to receive an affidavit, made even during the argument, as to the mere service of an order, and the Court saw no reason to depart from that practice now. And as to the "order," an order was produced in the matter, bearing the signature of the Judge who made it, and that the Court was bound to recognise, and, therefore, the preliminary objections were held untenable.

1) *The Sydney Morning Herald*, Oct. 12, 1847; *Supreme Court Practice*, Stephen's Supplement, 127. Cited 7 N.S.W. L. R. 189.

Fisher then objected, that upon the face of the order it did not appear that it had proceeded from the extraordinary jurisdiction of the Judge, which had been invoked under a particular Act of Council, nor did it appear the statutory conditions had been complied with. The Court was called on to confirm an order, made by a Judge by virtue of the Act, but it did not contain any reference to the Act under which it was made, nor did it embody facts, from which the Court might even now draw the inference, that it was such a case of emergency for the immediate interference of a single Judge. There was therefore nothing before the Court to confirm. *Christie v. Unwin* (2).

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REYNOLDS
v.
TREL.

The CHIEF JUSTICE said, that in all cases it had been so decided, that before this particular interference of a Judge could be exercised, a foundation for that interference must be laid ; and that foundation consisted in having it clearly set out in the summons that it was a case of emergency, and without that fact, a Judge had no jurisdiction ; and that he was inclined to think that the order itself made upon the hearing of that summons, ought to bear upon its face sufficient to show that the Judge who made it had jurisdiction. At all events in this case, where there was no affidavit setting out the facts of the emergency which influenced the Judge—before the Court—and with only a judge's order before it, which also did not state that the case was originally one of emergency, the Court has nothing before it to confirm.

The rest of the Court concurred.

Motion dismissed, without costs.

(2) 11 A. & E. 373.

1847.

DOE *dem.* LUMSDAINE v. BOLLARD. (1)

December 6.

Stephen C.J.
Dickinson J.
and
Therry J.

Evidence—Indirect evidence in reply—Evidence in rejoinder—Anticipation of defendant's evidence.

A plaintiff may give evidence in indirect denial of facts stated by defendant's witnesses only in cases where the Judge shall be satisfied, under all the circumstances, that the fact adduced by the defendant, and sought to be denied, was one which the plaintiff could not reasonably have anticipated would have been adduced.

In such cases the defendant ought to be permitted to give evidence in rejoinder.

A plaintiff, anticipating a defendant's proofs, and meeting the same by evidence, must do so fully and without reserving portion of his defence.

THE reserved judgment of the Court was delivered in this case by—

THE CHIEF JUSTICE. This was an ejectment, to recover possession of premises at Picton, called George Inn. The cause was tried in August last, before Mr. Justice Therry, when the following appeared to be the facts. The defendant had become tenant of the inn, under Mr. Lumsdaine, in 1845, for two years, ending on the 30th April, 1847. In the month of September or October preceding that date, some negotiation was entered into between the parties for a continuance of the lease for five months additional. The landlord denied that there was anything more than a negotiation, which was abortive. He accordingly demanded possession at the end of the two years, which the defendant refused to give, alleging that there was a concluded agreement for the additional five months, which was not in fact expired at the time of the trial. To prove this he called a witness, who swore distinctly that he was present when such agreement was made. The defendant's counsel then desired the witness to state the remainder of the conversation, in order to explain the matter—by showing that at the expiration of the five months an adjoining farm (also the property of Mr. Lumsdaine) would become vacant, when both properties were to be tenanted jointly by the defendant, for a term of seven years. His Honor rejected that evidence, as being immaterial to the issue; the only question in the case being the tenancy of the inn and not the farm. The plaintiff then, to contradict the defendant's witness (by showing there had been a proposition

(1) *The Sydney Morning Herald*, Oct. 30, Dec. 8, 1847.

only, without any concluded arrangement,) offered in evidence a letter of the defendant's, addressed to the lessor of plaintiff, at a date posterior to the conversation, in which, alluding to some written communication from the letter, the defendant refused to accede to the terms proposed. The receipt of the evidence was objected to, and the defendant's counsel insisted that, at all events, it was inadmissible without the communication to which it was in reply. The Judge thought, however, that he was bound to receive the letter, and the plaintiff had a verdict. The demise was laid on the day after the expiry of two years.

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dem.
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v.
 BOLLARD.
Stephen C.J.

In the last term, Mr. *Darvall* moved for a new trial, on the ground of the admission of that evidence, and the rejection of the residue of the conversation, on which he had sought to examine the defendant's witnesses. He tendered an affidavit, made by the defendant, setting out the correspondence, of which the letter formed part, and contended that the Jury had been led into most serious error, by having applied the contents of that letter to the five months' term, and consequently to the taking of the inn, whereas it now appeared that the subjects in dispute were exclusively the farm, and the proposed future conjoint lease of both, when the five months would have expired. In Mr. *Lumsdaine's* letter, put forward by the defendant (and to which the defendant's was clearly a reply) the terms of the seven years are dwelt on, and the defendant is apprised that, if he did not agree to them, he should not have the five months' lease. The defendant's rejection of those terms, Mr. *Darvall* insisted, were at the trial supposed to be a rejection of terms offered for the five months' lease of the inn. Mr. *Lowe* for the plaintiff contended, however, that the defendant's case was not bettered by the correspondence, as (he maintained) it showed that the granting of the additional five months depended entirely on the defendant's acceptance of the terms proposed for the seven years. As to the latter part of the conversation, which had been rejected, Mr. *Lowe* repeated the argument on the trial, that it related to a different matter, and therefore was immaterial.

We reserved our decision, in order that we might have an opportunity of considering, in a view of its final settlement, the question which so frequently arises as to the admissibility of evidence, on behalf of the plaintiff, in reply to the case of the defendant. The following, we believe, will be found to embody the leading rules and principles on this subject. Where there are issues arising out of pleas in denial, and pleas in confession and avoidance, the plaintiff may prove in the first instance so much of his case, only, as the defendant has denied, leaving

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dem.
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v.
 BOLLARD.
 Stephen C. J.

it to the defendant to prove his pleas of avoidance. Should the plaintiff adopt this course, he may give evidence in disproof of those pleas when the defendant's case has closed. He may, however, if he thinks fit, anticipate the defendant's proofs, and give evidence to meet the defence in the first instance. But, when the plaintiff does this, he must do so fully. He cannot reserve any portion of his evidence, or disprove the defendant's case by halves. Whichever of these courses be taken, it will occasionally happen that evidence may be given by the defendant, in denial of the case of the plaintiff (that is, in disproof of some averment traversed by the defendant) which the plaintiff may be distinctly able to contradict. In all such cases he may give evidence in reply for the purpose of contradiction. That contradiction, however, in every case where the defendant's evidence could reasonably have been anticipated, should be direct, and not argumentative. That is to say, the particular fact adduced in evidence for the defendant should be denied in terms, and not indirectly, or by inference only. The Jury will then not be embarrassed by complicated questions. Where the defendant's witness swears to a fact, and the plaintiff's witness swears that no such fact occurred, nothing remains but to decide to which of the two superior credit shall be given. But, if a plaintiff were allowed in all cases, in reply to evidence given of a fact, to adduce evidence of matters indirectly in denial of it, the Jury would have to determine the additional question, whether the two pieces of evidence were in themselves inconsistent. If such evidence be allowed in reply, evidence ought to be received in rejoinder. This, on the same rule, may be either direct or indirect; and thus trials would be almost indefinitely prolonged, and the questions for consideration be multiplied, to a most perplexing extent. On the other hand, if plaintiffs were compelled to adduce evidence, in order to meet every fact, or refute every assertion, which they may conjecture that the defendant may introduce, in disproof of their case, trials might be protracted quite as inconveniently, to the great waste of the public time.

The rules which we think may safely be laid down, therefore, as governing cases of this kind, are the following. We conceive that a plaintiff may give evidence in reply, in all cases, in *direct* denial of facts spoken to by the defendant's witnesses; and that the defendant will then have no right to call evidence in rejoinder. We are of opinion, also, that a plaintiff may give evidence in certain cases, in *indirect* denial merely; that is to say, in cases where (but where only) the Judge shall be satisfied, under all the circumstances, that the fact adduced by the defendant, and sought to be denied, was one which the plaintiff

could not reasonably have anticipated would be adduced. In such cases, we have no doubt that the defendant ought to be permitted to give evidence, where he shall be prepared to do so, in rejoinder.

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dem.
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BOLLARD.
Stephen C.J.

We have spoken of these rules, as applying to cases where there are pleas in denial, as well as in confession and avoidance. But they will be equally applicable, and the right of calling evidence in reply, or rejoinder, will equally be determined by them, in cases where one of the two species of pleas is pleaded only; or where, as in ejectment, the pleadings are wholly at large, and every kind of defence is admissible under not guilty. And, applying the rules in question to the present case, we are of opinion as follows. First, that the letter adduced in reply was an *indirect denial* only; and, secondly, that the matter in refutation of which it was offered, might reasonably (and indeed must) have been expected, since it is plain, that Mr. *Lumsdaine* knew well the intended defence. The letter, therefore, should not have been received. We are of opinion, however, that supposing it to have rightly received, a new trial ought still to be granted, as it now appears that the contents of the letter, detached from the correspondence of which it formed part, was calculated to mislead the Jury, and probably did mislead them as to the subject to which the expressions relied on had reference.

With respect to the conversation, the Judge was clearly right in rejecting the evidence, on the impressions entertained by him. It seems to us, however, that the taking of the Inn for the five months may have been, and it would seem that it probably was, in some way, connected with the proposed subsequent taking of the Inn and Farm conjointly, when the latter should be vacant. In that view, the two takings—though in one sense quite distinct—were in fact associated together in the minds of both parties; and the letting of the one might be an inducement to the taking of the other. For this reason, and because all the conversation, to which the witness could have spoken, at one and the same interview, we conceive on the whole that all should have been received. On the grounds specified, there will be a new trial—the costs of the former, to abide the event of such trial.

New trial granted; costs to abide the event.

1847.

DOE *dem.* COTTON v. FARRALL. (1)

Oct. 29.

Stephen C.J.
Dickinson J.
and
Therry J.

Evidence—3 Will. IV, No. 3, sec. 35—*Indent evidence of transportation.*

An indent, to be evidence of a person having arrived in the Colony as a convict, ought to state the offence, as seemed to be contemplated by the Act, 3 Will. IV, No. 3, sec. 35 (*per the Chief Justice and Therry, J., Dickinson, J., dissentiente*).

THIS was an action of ejectment, brought to recover possession of two-and-a-half perches of land, situate on the locality known by the name of the "*Rocks*," Sydney. This case was tried before His Honor Mr. Justice *Dickinson* last August, when the following facts appeared in evidence. The plaintiff claimed title to the property in question, from one *Hanslow*, who bought of one *Jane Farrall*, the wife of the present defendant. The deed of conveyance from Mrs. *Farrall* to *Hanslow* was very inartificially drawn, being, as it was alleged by counsel for the defendant, at the trial, neither a bargain and sale, nor an indenture, and in other respects, void, for not distinctly describing the parcels purporting to be conveyed thereby. The deed of grant from the Crown to Mrs. *Farrall*, was put in and received in evidence, the grant having been made to her individually, as it was alleged; for though a married woman, yet that her husband at this time was a prisoner for life, having arrived as a convict, as it was attempted to be proved at the trial, in the year 1814, in the ship *The Three Bees*. To prove this latter circumstance, the plaintiff produced from the Colonial Office, under the Act in that case made and provided, a certain "indent," purporting to contain the names of the persons who came as prisoners in that vessel, and in that "indent" was found the name of a person bearing the same Christian and surname as the defendant, but no clear evidence was adduced to prove that the defendant was the person so described; or that he came out in the said ship as a "convict"; or that upon his arrival he was treated as one.

For the defendant evidence was adduced to show that he was married to said *Jane Farrall* at the time she conveyed, and, therefore, as he was not likewise a conveying party, the deed to *Hanslow* was void against him.

(1) *The Sydney Morning Herald*, Dec. 30, 1847. (See *Doe d. Tagwell v. Farrell, ante*, p. 399.)

His Honor told the Jury that he thought the title had been properly traced, and that the "indent" was under the Act sufficient evidence to prove that the defendant arrived in the colony as a prisoner for life, and therefore upon the authority of the case *Doe dem Smithers v. Clarke*, decided in this Court (1834), *Jane Farrall* was in the eye of law a *femme sole*, and therefore as such might have legally conveyed her property without the intervention of her husband. (2) The Jury found a verdict for the plaintiff. The case now came before the full Court on a motion for a new trial.

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dem.
COTTON
v.
FARRALL.

Foster, for the defendant, contended as follows :—That the deed from *Jane Farrall* to *Hanslow* was void, it being a mere deed poll, and not *inter partes*, and therefore could not be viewed in the light, as it was at the trial, of a bargain and sale; nor was it an indenture, and much less was it a feoffment, because it did not contain the usual technical language of such a deed, 2 *Blac. Com.*, and *Jacobs's Law Dictionary*. The deed was also void in respect of the parcels; and the evidence adduced at the trial, to render that certain in this respect, viz.: the parcels, which was otherwise uncertain, sufficient. And lastly, that the "indent" of the fact of the defendant's having arrived here a prisoner was improperly received. It was submitted on this point, that as such evidence was received by virtue of a statute which substituted such evidence for the highest evidence the law recognises, viz., records, that that Act ought to be construed strictly; the provisions of that Act, 3 Will. IV, No. 3, section 35, require that the indent produced shall contain the name of the convict, his offence, and sentence. Now, the indent produced did not contain the offence for which the defendant was transported; and it may so have happened that he was transported for an offence that was not a felony in itself; and as it was suggested by the Court, in the course of the argument, that it was not apparent at law why a person even transported for life for an offence not a felony might not have acquired land by grant. Besides, in other respects the evidence at the trial did not show that the defendant was treated as a convict on board the vessel, or that he had been so treated upon his arrival here. All the evidence adduced was consistent with the defendant having arrived here as a sailor on board the vessel.

Michie, in support of the verdict, claimed that the indent was conclusive evidence of the condition in which the defendant arrived. The Act that substituted this evidence could not be applied so strictly to this indent, which was made out long before the Act passed.

(2) No satisfactory report of this case can be obtained, but see 1 S.C.R. App. 33.

1847.

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dem.
COTTON
v.
FARRELL.

The Court held that a new trial should be refused as to the other grounds, but as to the indent that a new trial should be granted (*Dickinson, J., dissentiente*).

Their Honors the CHIEF JUSTICE and Mr. Justice TERRY thought that an indent, to be evidence of a person having arrived in the colony as a convict, ought to state the "offence," for this the Act seemed to contemplate; here the indent produced did not state the offence, nor did the evidence produced prove that the defendant had arrived here as a transported felon, and was reputed and dealt with as such, when in the colony, which the Act also required.

His Honor Mr. Justice DICKINSON disagreed on this point with the rest of the Court,—intimating that, looking at the preamble of the Act, and the several clauses, he considered that the indent was merely meant to be evidence of the "term," and not the "sentence" for which the convict came, and therefore that the indent was rightly received, though it did not state the sentence.

New trial granted; costs to abide the event.

DOE *dem.* SWAN *v.* M'DOUGALL. (1)

1847.

Ejectment—Crown grant “in trust”—Will—Jus tertii.

Dec. 3.

Stephen C.J.
Dickinson J.
and
Therry J.

A person who has had twenty years possession of land, if he lose his possession, may be effectually defeated, on his bringing an ejectment, by showing actual title in another. The promisee of a Crown grant, having by his will disposed of his lands to the plaintiff and another, died before issue of the grant. Subsequently a grant was made to the trustees of the will (who by the terms thereof had no estate in the said lands), in trust for the persons entitled under the will.

Held, that the grant conveyed the legal estate, as the testator, under the will, would have devised it, had he, at the date of the will, the legal estate in himself.

THE judgment of the Court in this case was delivered by—

Dec. 10.

THE CHIEF JUSTICE. On the trial of this case at the last Maitland Circuit, before Mr. Justice Therry, the facts appeared to be as follows: The father of the lessor was the *promisee* of the land from the Crown, and he was in possession of it for twenty years and upwards. The lessor proved the death of his father, and that he was heir at law, and there he rested his case. The defence was, that the deceased had made a will, and that, after his death, the Crown granted the land to two persons, John Boughton and William Dunn, and their heirs “in trust for the several persons mentioned in the said will, according to their respective rights and interests, under the limitations in the said will.” The will, however, was not produced. The counsel for the plaintiff did not object, that the grant was inadmissible in evidence, without the will; but he contended that its non-production afforded a strong inference in support of the plaintiff’s case, and entitled the jury to presume that the will, had it been produced, would have supported the title of the heir, by showing some trust or limitation, as to the property in question, for his benefit, so that the will and the grant, taken together, if any effect could be given to them, operated to convey it to him as the party solely interested under the will. But the learned counsel relied on the case of *Doe d. Chapman v. Kains*, decided in this Court, as establishing the position that a grant so worded, without showing who were the parties intended to take, or who could and would take under the instrument

(1) *The Sydney Morning Herald*, Dec. 4 and 11, 1847; and April 11, 1848.

1847 referred to by it, was wholly inoperative for any purpose. On the supposed authority of that case, the Judge directed a verdict for the plaintiff.

DOE
dem.
SWAN
r.
M'DOUGALL.
Stephen C.J.

The *Solicitor-General* moved, on Friday last, for a new trial, contending that it was competent for a defendant in ejectment, notwithstanding twenty years' possession in the lessor of the plaintiff, to show actual title to the land in the Crown, and that the Crown had granted it to some third person other than the particular party here claiming. He denied that *Doe v. Kains* was an authority for the point asserted. The Court had there only determined that a grant to one in trust for another or others, having regard to the Statute of Uses, vested the estate in the latter. He might admit that it was uncertain who took the estate, therefore, in this case. But it was sufficient for the defendant to have shown *prima facie* (as by the terms of the grant he had shown), that the estate was in "several persons," not one person. If the lessor of the plaintiff was one of these, or (which was necessary) was the only one of them now entitled under the will, he should have shown it in reply. In the absence of any such evidence, it must be presumed that the title was in some one else, and the more so, as the lessor had distinctly claimed as *heir* and not as a devisee. In answer to these arguments, Mr. *Lowe* for the lessor of the plaintiff, contended, but without citing any authority for the position, that unless a valid conveyance from the Crown to some third party had been shown, the plaintiff's case was unimpeached. And he submitted that no such conveyance had been shown. First, because until the will should have been produced, it was not possible to say that anyone whatever could take under it or, at any rate, could take in the way intended by the grant, in which case the latter (according to the principles which govern grants from the Crown) would be void. Secondly, because the will and the grant formed but one conveyance, and one without the other was incomplete, if not inadmissible. Finally, he urged the argument relied on at the trial, that the non-production of the will, especially after opening it to the jury, supplied a strong presumption as to its effect and purport, in the plaintiff's favour.

We have, since the argument, referred to the case of *Doe v. Kains*; and, as it is one often referred to, and not always accurately, we think it desirable to state it here. It was an ejectment tried before me on the 4th November, 1842, and decided in this Court, after argument, the 3rd February following, by Sir *James Dowling* and the then other Judges. The demise relied on for the plaintiff, was from *William Henry*

Chapman, and in support of his title a Crown grant was produced, by which the land in question was conveyed to him and his heirs, "*upon the trusts contained in a certain deed, dated,*" &c.—which was described. What the trusts in that deed were, however, was not declared; and the deed itself was not produced at the trial. A verdict was taken for the plaintiff, subject to the opinion of the Court, on the question whether the grant vested any title in *Chapman*. It was insisted for the defendant, that under no circumstances could the legal estate be in *Chapman*; that, at all events, it would not be in him, unless he were also the party, or one of the parties, beneficially interested under the deed of trust, that the use was clearly either in those parties, or, if there was in fact no such deed, or the trusts created by it were satisfied, the estate had reverted to the Crown, but that the lessor of the plaintiff, by not producing that deed, had left the question of title in doubt, and so had entirely failed. The Court was of opinion, that under a grant so worded, the legal estate was clearly in the *cestuis que trust*, whoever they might be, and not in the trustee, and that, by not producing the deed referred to, he had failed to establish even a *prima facie* case of title. A nonsuit was therefore directed to be entered. And Mr. Justice *Burton* inclined to the opinion, that the deed should have been produced, as incorporated with the grant, and therefore forming part of one and the same conveyance,

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dem.
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Neither of the points decided on that occasion, therefore, is quite what was supposed in this case by the plaintiff's counsel. The grantees here could not have made out a title, or certainly not without producing the will, and showing that they were the persons indicated, as being mentioned therein. But the grant may, nevertheless, show, *prima facie*, that some other persons—or, at any rate, *some* persons—were so indicated; and that would be sufficient to defeat the lessor (assuming him not to be, personally, one of those persons, and capable of taking a sole beneficial interest), without showing who those persons were. We do not say, however, that the grant was properly in evidence without the will, or complete as a conveyance without it. Nor need we determine whether the jury would have been justified in presuming that the lessor, here, was in truth the *cestui que trust* under the will, and so clothed with the legal estate intended to be conveyed by the grant; for we are of opinion that the case may and ought to be decided on other grounds.

A plaintiff in ejectment, as we have recently observed in another case, can recover on his own title only. He must have the legal estate, and

1847. of this possession is *evidence* only. If the legal estate be shown to be outstanding in another person, there is an end of the case. The *jus tertii* is sufficient for a defendant in this form of action. If the plaintiff have not *title* (or, at least, title as against the defendant), he cannot disturb that defendant's possession. It was said, however, that twenty years' possession gives a title, that such a possession is not merely evidence of title. It was further said that, supposing it not to be so against the Crown, or its grantee, yet there must be a grant issued, and that grant a valid and effectual one; that proof of title in the Crown, by a person having no right to interpose for the Crown, would not defeat a right founded on twenty years' possession. We are aware of no authority for either of these positions; and, as to the latter, the case of *Goodtitle v. Baldwin* (2) appears an authority distinctly the other way. A possession for twenty years, no doubt, cannot ordinarily be defeated by an ejectment; but if the party lose his possession, we apprehend that his *prima facie* title may be defeated as effectually, on his bringing an ejectment, by showing actual title in another, as if that possession had been only for ten years or for one year.

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Now in this case, the plaintiff showed twenty years' possession and upwards. That established a strong *prima facie* case of title. The question is, was that case overcome by equal or better evidence of title in a third person, or in the Crown? Supposing that the Jury might, (as suggested in *Goodtitle v. Baldwin*), have presumed a Grant to the lessor of the plaintiff, from the Crown, the same case shows that the authority of the Crown may be equally presumed, in respect of Crown land, after a period much less than twenty years. Then has or not any such presumption here, in favour of the lessor of the plaintiff, been defeated, by the fact that a grant has been issued by the Crown to some one else? This Court has held that fact to afford a presumption, that the land was, at the time (*i.e.* immediately before the issue of the grant), in fact the property of the Crown. We say nothing as to any evidence, in fact of title in the Crown, in aid of that presumption, because no such evidence appears in this case to have been given. But it appears to us, that the question to whom a grant has issued, or whether a valid (or indeed any) grant had issued, was not material to the issue, on this ejectment, any further than as the fact tended to show, by inference, that no legal title existed in the lessor of the plaintiff, notwithstanding his possession. We are clearly of opinion, that the question of that title was the substantial one for trial. We therefore think that, as that title would have

been and will be defeated, by showing that the title was actually in the Crown, (and so, not in the lessor,) whether a valid grant has been executed or not, the case must be sent down for another trial for the purpose of enabling the Jury to determine the question as to such title. The costs will abide the event.

New trial ordered ; costs to abide event.

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This cause came on for trial again in February, 1848, at the Maitland Assizes, before the *Chief Justice*.

It appeared in evidence that the lessor of the plaintiff, *Richard Swan*, claimed title under the will of his father, *John Swan*, dated Feb. 8, 1833, such parts of which as are material, being to the following effect. After devising his farm, &c., a part of which was now claimed, to his wife *Margaret*, while she continued single and unmarried, and after her death, (the testator proceeds), "I devise and bequeath half of my said farm unto my son *Richard Swan*, if he should arrive out from England, and reside in this country, and not otherwise, the same half of my farm to consist of my dwelling, &c., and 200 acres of land adjoining thereto, as divided and allotted by me, to hold, &c." "and the other half of my said farm, containing about 220 acres, &c., I give, &c., to my youngest daughter, *Jane Swan*, &c.," "and I hereby order my trustees" (the same persons mentioned as executors and executrix, the wife of the testator, *John H. Broughton* and *William Dun*), "or the survivor or survivors of them, shall have full power and authority to determine any dispute or difference in the division of my said property." On Aug. 24, 1841, a grant issued for 180 acres only to the said *John H. Broughton* and *William Dun* and to their heirs, in trust for the several persons mentioned in the said will, according to their respective right and interests under the limitations in the said will. The testator died shortly after making his will.

At the trial it was agreed that a verdict should be returned for the plaintiff, and the case referred to the full Court, reserving to the Judges leave to draw such inferences as a jury might from the evidence, to ascertain whether a verdict should not be entered for the defendant.

Stephen C.J.
Dickinson J.
and
Manning J.

The *Solicitor-General*, for the defendants, moved in accordance with the leave reserved, *Gregory v. Henderson*. (3).

Lowe, in support of the verdict, *Hawker v. Hawker* (4) ; *Hodges v. Horsfall* (5) ; *Jarman on Wills*, I, 363, 367.

(3) 4 Taunton 772. (4) 3 B. & Ald. 537. (5) 1 Russ. & Milne 116.

1848. The CHIEF JUSTICE, in delivering the judgment of the Court, said
DOE that the first question here was, whether the grant would convey the
dem. legal estate, as the testator, under the will, would have devised it, had
SWAN he, at the date of his will, the legal estate in himself? He, and Mr.
v. Justice *Dickinson*, were both of opinion, that the grant did so convey,
M'DOUGALL. and that under it the legal estate was now in the lessor of the plaintiff,
and the testator's daughter, "Jenny," and further, they could not
accede to the argument, that it was in the trustees under the will, for
here the will contained no skeleton of a devise or apt words, by which
the legal estate could pass to them. The next question was, did the
evidence that had been adduced sufficiently identify the land the plaintiff
was to take under the will? His Honor said, that he and Mr. Justice
Dickinson, drawing the same inference from the evidence as a jury
might, a liberty that was reserved to them, were both agreed that that
doubt had been solved in favour of the plaintiff by the evidence adduced,
and that it was admitted for that purpose; though, of course, as to the
actual quantity, they could not determine, and whatever he took under
his writ of *habere facias possessionem* he would do so at his peril. Mr.
Justice *Manning* intimated that he would not take part in determining
the question involved, as he had been concerned as counsel in the case.

Verdict for plaintiff upheld.

OUTTRIM v. BOWDEN. (1)

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Dec. 13.

Practice—Judge in Chambers—Coextensive jurisdiction with Full Court—Discretion of Judge—Appeal.

Stephen C.J.
Dickinson J.
and
Therry J.

Where the Court and a Judge have a coextensive and alternative jurisdiction, there can be no appeal to the Court from the Judge, if the matter is one purely in the discretion of the latter.

(*Semble*) the 20th section of the Jury Act, 11 Vic., No. 20, has not put it out of the power of the Court, or a Judge, to compel a person to submit his cause of action to arbitration, under 5 Vic., No. 9, s. 18.

In this matter a rule *nisi* had been obtained on a former day calling on the plaintiff to show cause, why the matter in difference in the cause should not be referred to an arbitrator.

Fisher, for the defendant, moved that the rule be made absolute.

Darvall, for the plaintiff, took the two following objections: first, that the application had already been made before a Judge in Chambers; that he dismissed the same, and, therefore, that the application could not be renewed before the Full Court by way of appeal. His second objection was, that the 20th section of the last Jury Act (2) put it out of the power of the Court, or of a Judge, to compel a person to submit the cause of action to an arbitrator, for that section provided that all actions should be tried before a Judge and a Jury, &c.

Fisher, contra. The Court had power to entertain the motion, *Pike v. Davis* (3); *Wearing v. Smith* (4); *Johnstone v. Knowles* (5).

The Jury Act could not repeal the Advancement of Justice Act by implication.

The CHIEF JUSTICE, in delivering the judgment of the Court, said, that he was of opinion that the first objection taken to the motion was a good one, and ought to prevail; and the rule he laid down was this: that where the Court and a Judge have a coextensive and alternative jurisdiction, and a Judge having decided, it not being a subject matter within his discretion merely, and being wrong either in his view of the facts or of the law, then the same application might be made, by way of

(1) *The Sydney Morning Herald*, Dec. 14, 1847. Cited 5 S.C.R. 17, and 7 N.S.W. L.R. 72. (2) 11 Vic., No. 20. (3) 6 M. & W. 546. (4) 10 Jurist 924. (5) 1 D.N.S. 30.

1847. appeal to the Full Court ; but, if the matter, as in this case, were purely
OUTTRIM within the discretion of the Judge, whether he should allow the appli-
v. cation or not, then no application by way of appeal could be made to the
BOWDEN. Court.
Stephen C.J.

His Honor further said, but without giving any opinion upon the statutory objection, that the majority of the Court were of opinion that that objection could not be sustained. The application was therefore, the distinction, now drawn, being new, dismissed without costs.

Rule discharged without costs.

DOE *dem.* COOPER v. HUGHES. (1)

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Dec. 13.

Ejectment—Sale by Sheriff of right, title, and interest—Prior conveyance—Registration Act, 7 Vic., No. 16—“Right, title, and interest.”

Stephen C.J.
Dickinson J.
and
Therry J.

Certain land having been conveyed by D. to the defendant, part of the consideration being an annuity secured on the property, but the transfer not being registered, the Sheriff afterwards sold to the plaintiff all the estate, title, and interest of D. in and to the land, and all his right, title, and interest, in and to the annuity (the “alleged” conveyance to the defendant being recited in the deed), and the plaintiff’s transfer was thereupon registered. Verdict in ejectment having been given, by direction, for the plaintiff, and the jury having found, specially, that the sale to the defendant was *bona fide* and for value, the Court was moved, on leave reserved, to enter a nonsuit. *Held*, that the sale by the Sheriff could only operate to convey the land, if there had been some secret or fraudulent arrangement, showing the sale to the defendant to be fictitious, but, as the jury had found the latter to be a genuine and real transaction, for value, the former conveyance merely operated as a transfer to the plaintiff of the annuity.

MOTION on point reserved to enter a nonsuit, the verdict below having been for the plaintiff. The facts and argument are set out in the judgment of the Court, which was delivered by—

The CHIEF JUSTICE. In this case, which was tried before Mr. Justice Therry in March last, both parties claimed the land in dispute, under one *David Dyer*, the lessor of the plaintiff, under a bill of sale or conveyance from the Sheriff, of a date posterior to the defendant’s conveyance, but *duly registered*; and the defendant, under a conveyance from *Dyer*, executed before the issue of the writ under which the Sheriff sold, but at the time of the bringing of the ejectment *unregistered*.

For the defendant it was contended, that the Sheriff had conveyed only *Dyer’s* then right and interest, which consisted in a rent charge or annuity merely, and not the land, but that, in so far as he had conveyed (or the bill of sale had purported to convey) the land, it was subject expressly to the defendant’s conveyance, and therefore that the latter’s title was distinctly saved. For the plaintiff it was insisted, on the contrary, that the plaintiff’s conveyance to *Cooper*, being registered, was the only one possessing any validity; that the defendant’s being unregistered, could (as against the former) operate nothing—that the Sheriff conveyed the land unaffected by *Hughes’s* claim to it if the

(1) *The Sydney Morning Herald*, Dec. 15, 1847.

1847. foundation of that claim was thus, or by any other means, destroyed, and that it was so destroyed, if not by such non-registration, yet by fraud—as *Dyer's* sale to *Hughes* was *mala fide* and without consideration. The Judge left the question of fraud to the jury, but told them to return a verdict for the plaintiff—reserving leave to the defendant to move for a nonsuit, should the Court be of opinion that the plaintiff's case was not established, either by reason that the Registration Act conferred no priority, under the circumstances, over the defendant's conveyance, or otherwise. The jury found, specially, that the sale to *Hughes* was *bona fide* and for value.

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The conveyance to *Hughes* was by *Dyer* and his wife, in consideration of £200 then paid, and an annuity to them (during their lives, and the life of the survivor) of £104, secured on the property, with powers to them of entry, and distress in case of default. The bill of sale from the Sheriff recites that conveyance (which is mentioned, however, as “a certain *alleged* conveyance” only), and that *Dyer* was said to be seized of or entitled to the land in question, *save so far as the same stood thereby effected*, and that the Sheriff had, under a certain writ in that behalf, levied on and sold all *Dyer's* interest in the annuity, secured on the said premises, and also *all his estate, title, and interest, in and to the land*; and then the Sheriff bargains and sells to *Cooper* all the right, title, and interest of the said *Dyer*, in and to the said annuity, and also *all his right, title, and interest, in and to the land*: to hold the said annuity and land to *Cooper*, “his heirs, executors, administrators, and assigns, for ever, in as full, ample, and beneficial a manner as the said *David Dyer* could or might have held or enjoyed the same.”

The questions reserved at the trial were argued before us, by Mr. *Fisher* for the defendant, and Mr. *Windeyer* and Mr. *Broadhurst* for the plaintiff. We have fully considered them; and we are of opinion that a nonsuit must be entered. We have no doubt that conveyances by the Sheriff are within the provisions of the Registration Act. Probably, therefore (though on this we give no unqualified opinion), the Sheriff might convey *bona fide* to a purchaser, any property, which the party against whom the execution issued could himself, if acting *bona fide*, convey. But, looking here to the terms of the bill of sale, and seeing that it is not a mere simple conveyance of the land in question, or even of *Dyer's* right and title to it (which, however, strictly speaking, amounted to nothing), but that, in the first place, the conveyance of the land is, only, to hold *in as ample a manner as Dyer himself could hold*,—secondly, that the Sheriff, and the purchaser from him, had notice of

Hughes' conveyance, and that it might affect *Dyer's* title and interest to and in the land, as the bill of sale expressly states,—thirdly, that no more than *that title and interest*, whatever it might turn out to be (the prior conveyance having been thus distinctly referred to), was levied on, or declared to have been sold,—and lastly, that the *annuity* is throughout the Sheriff's conveyance made the prominent object of sale, or it is at any rate made the object of sale, throughout, *jointly with the land*, or the title to and interest therein, respectively, we are of opinion that under the last mentioned conveyance the land in question in this case did not pass. The deed to *Hughes* being unregistered, *Dyer* could afterwards (if *bona fide*, according to our decision in *Doe d. Irving v. Gannon* [2]) have executed a valid conveyance to a third party. That was a right vested in him affecting the land—such, at all events, as could enable him in any way to “hold or enjoy” that land. It is at least clear, that *Dyer* could only enjoy *one* of the two things mentioned, either the annuity, or the land. He could not have both. If the conveyance remained intact, the land would be *Hughes's*, the annuity would belong to *Dyer*. If he conveyed away the land to some one else, however, by a registered and valid deed, the land would have been then resumed by *Dyer*, and the conveyance to *Hughes* being invalidated, the annuity would have been destroyed. But here the Sheriff, in the instrument relied on for the plaintiff, professes throughout to convey *Dyer's* interest in the land, and *in the annuity also*: as if *Dyer* could possibly be entitled alike to both.

It appears to us, all things being taken into account, that the clue to this apparent inconsistency is to be found in the first recital—touching the (so termed) “alleged” conveyance; namely, that of *Dyer* to *Hughes*. And we think that the following is the explanation. The Sheriff meant to sell all which *Dyer* really had (or had a right to), and no more;—if the *land*, because of some secret or fraudulent arrangement, showing that the sale to *Hughes* was fictitious, then the Sheriff's conveyance was so worded, as to secure the land;—but, if the *annuity*, because the sale to *Hughes* was a genuine and a real transaction, for value, then there would clearly be a conveyance of the annuity. This latter, therefore, is that which the lessor of the plaintiff purchased—and his supposed right to the land, for which the ejectment was brought, entirely fails.

Nonsuit entered.

[2] *Ante*, p. 400.

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DOE *dem.* ASPINWALL *v.* OSBORNE. (1)

Dec. 14.

Stephen C. J.
Dickinson J.
and
Therry J.

Estoppel—Interest of Promisee before Crown grant—Lease and Release in one Deed—Recitals—Estoppel fed by Crown Grant—Conclusive Admission.

The defendant claimed the land in dispute under a lease and release in 1832, purporting to be a conveyance of the fee simple, and reciting a seizin in fee, from one K., the promisee of a Crown grant, to W.; the grant to K. afterwards issued in 1839. In 1843 K. conveyed the same land to M., one of the lessors of the plaintiff. *Held*, on motion to enter a verdict for the defendant (1) that the lease and release of 1832, though contained in the same deed, operated as a good conveyance; (2) that the plaintiff was estopped by the lease and release, either by the release simply, or by the recital of the seizin in fee; (3) that such an interest did not pass under the conveyance as to defeat the estoppel, the most that K. had being an equitable interest, and that of a character not defined and very unintelligible; (4) that the estoppel would have been equally binding, by way of *conclusive admission*, without being pleaded, as the defendant had had no opportunity of so pleading it; and (5) that on the acquisition by K., afterwards, of the legal fee, by the grant, the defendant's apparent interest was converted into an actual interest.

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THE judgment of the Court was delivered by—

Jan. 4.

THE CHIEF JUSTICE. Ejectment for one hundred acres of land, in the district of Illawarra, tried before me on the 16th November last. The title relied on for the plaintiff was a very simple one, a Grant from the Crown to *John M'Kelly*, dated the 30th September, 1839, and a Conveyance from *M'Kelly*, of the 11th March, 1843, to *John Miller*—one of the lessors of the plaintiff. The answer to this for the defendant was, a previous conveyance of the same land by *M'Kelly* (in which he represented himself as being then seized in fee of the land, under a Crown Grant to him thereof) to *Edward Francis Weston*. It was admitted, that in fact no such grant had been issued; but that *M'Kelly* was, at the time of his conveyance to *Weston*, being the 19th October, 1832, a mere promisee of the land, under the usual circumstances of occupation by settlers, of Crown Land intended to be eventually granted to them. The conveyance was relied on, however, as operating by way of *estoppel*; and so, as binding not merely *M'Kelly*, but the plaintiff as claiming under him, and precluding both alike from setting up a title, in either of them, adverse to *Weston*. This was the principal point

(1) *The Sydney Morning Herald*, Dec, 15, 1847; Jan. 5, 1848.

in dispute. Sundry objections were raised, however, for the plaintiff, to *Weston's* conveyance, and eventually the case came before us, in the last Term, for our decision, the verdict being, by consent, to be entered for the plaintiff or the defendant as the Court should determine.

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The conveyance to *Weston* was by Lease and Release in one deed, being an Indenture bearing the date already mentioned. It contained recitals, that *M'Kelly* was then "under a grant from the Crown, seized in his demesne as of fee of the lands" thereafter described;—and that he had contracted for their sale, to one *Williamson* and his wife, by whom they were intended as a provision for *John Weston*, her son by a former marriage;—and that, for transferring the possession of the lands to *Edward Francis Weston*; and "enabling him to take a release of the reversion and inheritance of the same, to him and his heirs, upon the several uses and trusts" thereafter limited, it had been agreed that *M'Kelly* should "execute such bargain and sale to him thereof" as thereafter was expressed;—and then it is witnessed, that in the consideration of the premises, and of five shillings, *John M'Kelly* bargains and sells the land to *Edward Francis Weston*, to hold for the term of one year, from the day next before the day of the date of those presents, to the intent that, by virtue thereof, and of the statute for transferring uses into possession, he might be in the actual possession of the land, and enabled to take a release of the reversion thereof, and so on, in the usual form of conveyances by lease and release. The deed then further witnesses, that in pursuance of the contract, and in consideration of thirty pounds, *M'Kelly* grants, bargains, sells, releases, and confirms, to the said *Edward Francis Weston* (in his actual possession, or legally vested in him, "by virtue of the aforesaid bargain and sale to him thereof, and by force of the statute, &c."), to hold to him and his heirs, to the uses thereafter declared, being for the benefit of *John Weston*; to whom a power of appointment is given, to be exercised at any time after his coming of age. There were covenants by *M'Kelly*, that he was seized in fee, and had power to convey; but on these no stress was laid. A point was made at the trial as to the form of limitation for *John Weston* which, it was said, left a resulting use in *M'Kelly*, but this point was abandoned, on the argument in banc.

For the plaintiff it was contended by Mr. *Broadhurst*, that the deed purporting to convey to *Weston* was a Release only, without any Lease to support it, and that, even if the instruments could be incorporated in one (which he did not admit), there was here no effectual incorporation. As to the *estoppel* he said that there could be none against the

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plaintiff in this case, who claimed under a grant from the Crown, posterior to the defendant's conveyance. He maintained that there could in no case be an estoppel by a Lease and Release. A Release has no tortious efficacy; it will pass no more than what the release had to convey. The recital by *M'Kelly*, that he was seized in fee, did not convey the case at all farther. Every conveyance involved necessarily a recital (or an assertion, which is the same thing), that the party *has* what he affects to pass. But at all events, there could be no estoppel where an interest passed:—and here an interest did pass; for *M'Kelly*, as the promisee of the land under the Crown, had an effectual interest in it, available even against the Crown; but, at most, liable only to be defeated by the Crown. For the defendant, the estoppel was rested by Mr. *Lowe* mainly, if not exclusively, on the *recital*; for the same reason, apparently, which led Mr. *Broadhurst* to contend that the Release, as such, could not work an estoppel. But Mr. *Lowe* insisted, that *M'Kelly* had no interest to pass, and consequently that none passed, in fact, by his conveyance before the grant, and so, the estoppel was not defeated. He submitted, that the estoppel would equally exist, as well against those privy with *M'Kelly* in estate, as against *M'Kelly* himself, whether the deed to *Weston* was valid as a conveyance or not. But he contended that it was a perfectly good conveyance; for a Lease and Release were, in effect, but one deed; and, where the intent was manifest that both should so operate, it was immaterial whether they were in one and the same deed or not. The instrument first purported to convey for one year, and then to release the reversion to the lessee, treating him in possession by virtue of the statute: and the Court would marshall the two, so as to give each due effect. Mr. *Lowe* made a further point in the case, that, not only was there an estoppel by the conveyance to *Weston*, but that it was (in the language of the books) *fed*, or supported, by the Crown grant, so that the last mentioned instrument operated *eo instanti*, on its issue, to vest the estate in *Weston*, which *M'Kelly* only *assumes* to vest in him.

The cases and authorities cited were the following:—*Doe v. Oliver* (2); *Trevivan v. Lawrence* (3); *Rawlyn's Case* (4); *Johnson v. Mason* (5); *Barker v. Keat* (6); *Doe v. Barton* (7); *Eyston v. Simonds* (8); *Doe v. Shelton* (9); *Doe v. Ford* (10); *Doe v. Seaton* (11); *Blake v. Foster* (12); *Treport's Case* (13); *Palmer v. Ekins* (14); *Doe v. Wright* (15);

(2) Sm. L. C. 417. (3) *Ibid.* 435. (4) Rep. 51. (5) 1 Esp. 89. (6) 2 Mod. 252. (7) 11 A. and E. 307. (8) 1 Y. and Coll. N.C. 608. (9) 3 A. and E. 265. (10) 3 A. and E. 649. (11) 2 C. M. and R. 730. (12) 8 T. R. 487. (13) 6 Rep. 15. (14) 2 Ld. Ray. 1550.

Bowman v. Rostron (16); *Right v. Bucknell* (17); *Carpenter v. Buller* (18); *Cruise Dig.* 114; *Com Dig. Estoppel*, B. and E. 8; *Co. Lit.* 45, a and 47, b; 4 *Jar. Byth.* 123; *Bensley v. Burdon* (19).

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We have fully considered the question in this case, and have looked into all the decisions and authorities on them, and we are of opinion, first that the Indenture of 19th October, 1832, was a good conveyance by lease and release. In the *Barker v. Keat*, it is said that these two are but in the nature of one deed. If so, provided there be operative words applicable to each, there seems no valid reason why they should not actually be in one. The practice is, (or rather was, before the late Acts giving effect to the release alone), to date the lease the day before the date of the release. For this, there seems no adequate reason. If the lease operate but for one instant, there is something on which the release may take effect. The interest and estate, however, which pass by the lease, cannot be made greater in duration or degree, by merely giving the instrument an earlier date. Deeds operate, not from their date, but the time of their execution. But every one knows that the two instruments of lease and release are invariably executed, the one immediately after the other. Here, then, is an indenture purporting to do two things, first to create a term for one year, commencing the day previous, and secondly (on the assumption that there was then an actual possession in the bargainee) to release the reversion. Why should not the first clause, upon execution of the deed, instantaneously operate? But, this having so operated, why may not effect be then immediately given to the second clause? We find no authority for holding that such an instrument, thus comprising both lease and release, will not so operate; but there are opinions which may safely be adopted, in the absence of any such authority, to the effect that they may. Sergeant *Stephen* says that if comprised in the same deed, they (the bargain and sale and release) seem to be equally effectual." 1. *Steph. Com.* 497. He cited *Sugd. Gilb.* (which we have not been able to procure) 229 a. Mr. *Hayes*, no mean authority in such matters, says more positively, "If incorporated, and executed as one conveyance, in point of form, the Law would treat them as several and consecutive, in point of effect." 1. *Hay. Conv.* 77. Lastly, there is the passage cited from *Cruise*; and which is to be found in *Freem. R.* 251, where it is said by Lord C. J. *North*, that "he had known it ruled several times, that a Lease and Release in the same deed was a good conveyance—for priority should be supposed." 4 *Cruise Dig. by White*,

(15) 10 A. and E. 763. (16) 2 A. and E. 295. (17) 2 B. and Ad. 283.

(18) 8 M. and W. 209. (19) 2 Sim. and Stu. 519.

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114. This is, substantially, in accordance with the rule of construction stated in *Blackstone*, that, of two clauses in a deed, where the two are repugnant, the first shall stand not the last. 2. *Bl. Com.* 380. The rule is otherwise, as to the will—because since this speaks only from the testator's death, effect should be given to his last intentions, which were probably those the last expressed by him. But, in a deed, of which the operation commences immediately, every sentence naturally takes effect as it is written, and thus, the first clause first operating, at the moment of the execution of the instrument, any later and inconsistent clause is destroyed, before the time of its vitality has arrived. The first clause stands, then, because it has the earlier operation. But, in respect of the conveyance to *Weston*, both clauses may stand, because the second is not repugnant to, but connected with and intended to support the first clause. Since, however, the first clause first operated, the bargain and sale (contained in that clause) took effect before the release; and so, an estate was called into existence, which the latter was then immediately able to enlarge.

Secondly we are of opinion, that that conveyance operated as an estoppel, and, consequently (as an estoppel binds not only the parties, but affects the land equally in the hands of persons claiming under them), that the lessor of the plaintiff here, claiming under *M Kelly*, has failed to establish any right to recover in this action. It is not necessary to determine, in the present case, by what precise means that estoppel is created, whether simply by the *Release*, purporting to convey an estate in fee, without regard to the recital of a seizin, in points of fact, in fee, or whether it exists by force of that *recital*, taken in conjunction with the conveying words. It is sufficient to say, for the purposes of this judgment, that here the usual operative words do not stand alone, but are accompanied by an express recital, and consequently, that the case is one in which *Bensley v. Burdon* (20) is an authority in favour of an estoppel, whether it arise by the one case or the other. We have not any report of that case, as confirmed on appeal (21), but according to Lord *Tenterden*, in *Right v. Bucknell* (22), it would seem that the Lord Chancellor thought the estoppel created by the recital, whereas Sir *John Leach* rested it, rather, on the nature of the deed, being an indenture, expressing the opinion, that the character of the conveyance made no difference. The decision in *Right v. Bucknell*, we apprehend, does not in effect impeach *Bensley v. Burdon*, for the cases are clearly distinguish-

(20) 2 Sim. and Stu., 519.

(21) See 8 L.J., Ch. 87.

(22) 2 B. and Ad., 233.

able. In the latter, the releasor expressly asserted that he had the interest, which he afterwards affected to convey. In that case, therefore, there could be no doubt as to the intention. He represented himself, distinctly, as having an effectual legal estate; and *that*, consequently (the operative words being adapted to the passing of such an interest) was what he must have been understood as designing to pass. But, in the former case, the releasor made no such representation. He plainly stated, that he was only entitled legally *or equitably*. Here, then, it could not be concluded that he meant to convey a legal estate, unless it should turn out that he had one. The operative words of the conveyance, consequently, though (according to the usual form) purporting to pass a legal interest, being qualified and explained by the recital, amounted to no assertion that such an interest was possessed by him, and no estoppel, therefore, arose. For what is the meaning of estoppel? It is this, that a man shall not be permitted to deny, that he had in fact that, which by solemn deed he *said* that he had. Now in *Bensley v. Burton*, the releasor asserted that he had a legal interest; and he was estopped from denying that he had that interest. But, in *Right v. Bucknell* there was (for the reasons already given) no such assertion, and, consequently, the question whether the releasor might deny it, could not and did not arise. And this distinction between the cases shows, or would seem to show (notwithstanding the observation of the very learned Sir *Edward Sugden*, 2 *V. and P.* last edition, 1018, note *k*), that, after all, the nature of the conveyance, as held by Sir *J. Leach*, V.C., cannot affect the question of estoppel. The conveyance by lease and release, it is said, cannot operate by estoppel; for it will convey, only, what the party had, it has no tortious efficacy. But the question would clearly appear to be in a case of estoppel, not what the conveyance *does*, but what it *asserts*. It may well be, that since this particular assertion (that is, we take it, where the question of estoppel does not arise), passes only what the releasor has to give, he will be held under ordinary circumstances not to have intended to pass more, and, in such cases, it is obvious that no assertion, as to the degree or kind of interest possessed, can be implied. So, where the assertion is indistinct, or matter of supposition only, or the truth appears by the deed itself, notwithstanding the assertion, there is equally nothing to deny, and against nothing, therefore, would the releasor be estopped. But, where a distinct assertion of title is made, either by express words, or (as we should think) by necessary implication, in an indenture of release, it appears to us difficult to hold, though the point need not now be determined, that it shall not estop from subsequent denial, as effectually as it would

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1848. if made in any other indenture. In *Right v. Bucknell* (23), as well as
 DOE in *Bensley v. Burdon* (24), the conveyances were by lease and release,
 dem. yet, in the latter, an estoppel was held to be worked, and in the former
 ASPINWALL was only held not to exist, because there was no assertion (or no distinct
 v. assertion,) to be denied, or no assertion in respect of which the truth
 OSBORNE was not apparent in the deed, and so there could be nothing to deny as
 Stephen C.J. against the deed. But, if the conveyance by lease and release could
 not operate by estoppel, because of the rule supposed, the inquiry
 whether the deed contained any such assertion or not, was profitless and
 idle.

As to the objection, that here an interest passed to *Weston*, in respect of the right which *M'Kelly* then had to the land, as the promisee thereof, and that so there was no estoppel, we are of opinion that an interest or imperfect right of the kind relied on, is not such as can operate to defeat an estoppel. In the instances cited, the interest which passed was a legal interest of the same kind as that assumed to be conveyed, but less only in *extent*. The grantee in those cases acquired *some* of the interest, which the deed professed to give him, and he *might* by possibility enjoy the whole. A tenant for life, for instance, leases for a term of years, but dies before its expiry. In such a case, the lessee shall not be estopped to say that the interest of his landlord has ceased. And hence the general rule on this head. A tenant may not show that his lessor had *nothing* in the premises; but admitting that the latter had an interest, which passed by the demise (in which case there is no estoppel), he may show that the title has expired or been determined. The instance put in *Co. Lit.* 45 a, is of a tenant for life, and the remainder man executing a joint lease. In that case each had a legal interest, though not in an estate in possession, and consequently an interest passed from each. No estoppel, therefore, was created against either, and it was open to both to show that the demise was in effect that of the one seized for life alone. But, in the present case the most that *M'Kelly* had was an equitable interest, and this of a character not defined and very unintelligible. He may have had a mere permission to occupy without power to transfer the occupation to another, But *M'Kelly* professed to convey a legal estate in fee, and of *that* amount or kind of interest; at all events, he had at the time nothing whatever. In *Blake v. Foster* (25) Mr. Justice Grose expressly says, in delivering the judgment of the Court, that the interest which passes by the indenture, to avoid an estoppel, must be some legal interest. As

(23) 2 B. and Ad., 283.

(24) 2 Sim. and Stu., 519.

(25) 8 T. R. 496.

to *Doe. v. Barton* (26), that case is very little to the point. There the tenant (who was allowed to show the expiry of his landlord's title) acquired a legal possession, as the Court distinctly determined, under that landlord, when mortgagor in possession, by the mortgagee's assent, and it was held that though the latter alone had the entire legal estate, he was at liberty to consider the mortgagor as a tenant in possession and himself as reversioner only. But there, whether the tenant got a legal or an equitable estate, or no estate at all, was immaterial. He could not deny that some interest passed, for he had admitted that by accepting the relation of tenant, and whether that interest was legal or equitable, he would equally have been at liberty to avow that it had ceased. In *Right v. Bucknell* (27) an equitable interest clearly passed by the conveyance, a point which the Court noticed. The estoppel was not, however, in that case, supposed for a moment to be avoided on that ground, but on the ground only, that party never asserted that he had a higher estate to pass, and, consequently, that there was nothing on which an estoppel could fasten.

On the whole, then, we find in this case a conveyance, which, had the conveying party (*M Kelly*) possessed the interest which he assumed to have, would have conveyed that interest to the releasee, being the legal estate, in fee, in the land here in question, of which interest *M Kelly* had at the time nothing—and we find, that he afterwards, by grant from the Crown, acquired that legal fee, and then assumed to convey it to *Miller*, one of the lessors of the plaintiff. We are of opinion that, under such circumstances, the first mentioned conveyance worked an estoppel, binding the land in the hands of a subsequent purchaser, and on the acquisition by *M Kelly* afterwards of the legal fee, by the grant, converting the apparent into an actual interest. The plaintiff, therefore, is not entitled to recover, and the verdict must be entered for defendant. If the estoppel operated, only, by way of *conclusive admission* (see 2 Sm. L.C., 436, and in p. 444, 457), it is one equally binding on the jury, in this action, as on the parties, without being pleaded as such; for the defendant has had no opportunity of so pleading it. But, regarding the estoppel here as that which, under the circumstances, *passed an interest* it would seem (see *Com. Dig. Estoppel E. 10*), that, had the jury found the facts, without regard to the admission, as such, our judgment should be the same. Taking the case either way, therefore, the plaintiff would be equally concluded.

Verdict entered for defendant.

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Dec. 23. Arrest of judgment—Wagering contract—16 Car. II, c. 7, s. 3—Aider by verdict—
Facts not stated on the record.

Stephen C.J.
 Dickinson J.
 and
 Therry J.

Action for damages on a wagering contract for not running a horse according to agreement. *Held*, that a party cannot indirectly recover by action the amount of a bet, which the statute, 16 Car. II, c. 7, s. 3, says he shall not obtain directly by suit in any Court.

On a motion in arrest of judgment the Court is not to look out of the record, and if the pleadings state only so much of a transaction as is illegal, the Court will not adjudge it valid by combining with it other facts, which, though not stated on the record, they may conceive to have had a possible existence.

A verdict cannot import into a declaration a new fact, though it may show that an *essential* fact, defectively stated in the declaration, was properly proved at the trial.

THE reserved judgment of the Court was delivered by—

DICKINSON, J. The second count of the declaration states that it was agreed between the plaintiff and defendant that the defendant should have a certain colt called *Whalebone*, and that the plaintiff should have a certain mare called *Cassandra*, on a then future day, upon a certain racecourse, for the purpose of then and there running a race against each other for the sum of £250 a side, and that one *John Rose Holden*, or his nominee, should be the judge of the said race; and the said agreement having been so made as aforesaid, in consideration thereof, and in consideration that the plaintiff, at the request of the defendant, had then and there promised the said defendant to perform the said agreement on his part, and to pay him the said defendant the sum of £250 in case the said colt *Whalebone* should win the said race, he, the said defendant, then and there promised the said plaintiff to perform the said agreement on his part, and to pay him, the said plaintiff, the sum of £250 in case the said mare *Cassandra* should win the said race; and the plaintiff further saith, that after, and in pursuance of the said agreement, he did have the said mare *Cassandra* upon the said racecourse at the time appointed in and by the said agreement; but that the said defendant did not have the said colt *Whalebone* on the said racecourse at the time last aforesaid, whereupon the said mare *Cassandra* was then and there duly started by and in the presence of the said *John Rose Holden*, and did then and there run the said race and win the same, and was then

(1) *The Sydney Morning Herald*, December 21 and 27, 1847.

and there duly declared by the said *John Rose Holden* to be the winner of the said race; yet the said defendant (although often requested so to do) did not pay the said plaintiff the said sum of £250, or any part thereof.

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To this count the defendant pleaded, that at the time of making the said agreement mentioned in this count, and by the said agreement, it was agreed among other things between the plaintiff and the defendant, that a portion of the said sum of £250 a side mentioned in the count, that is to say, the sum of one hundred pounds a side, should be deposited forthwith in the hands of one Captain *O'Connell*, and that a certain other portion of the said sum of two hundred and fifty pounds a side, to wit, £100 a side, should be deposited in the hands of the said Captain *O'Connell* in a month from the date of the said agreement, and that the residue of the said sum of £250, to wit, the sum of £50 a side, should be deposited in the hands of the said Captain *O'Connell*, or his deputy, on the morning of the day of running the said race, and that if either the plaintiff or the defendant should fail to make good his deposit or deposits, he should forfeit the previous sum or sums deposited by him; and the defendant says that he (the defendant) did forthwith, after the making of the said agreement, deposit with the said Captain *O'Connell* the said sum of £100, portion of the said sum of £250 a side, so to be first deposited by the defendant as aforesaid; but that the plaintiff did not forthwith, after the said agreement and according thereto, deposit with the said Captain *O'Connell*, the said sum of £100, to be first deposited by the plaintiff as aforesaid, but therein made default; whereupon and within a reasonable time in that behalf, to wit, on the day and year last aforesaid, the defendant wholly abandoned and rescinded the said agreement in the said second count mentioned, as he lawfully might for the cause aforesaid, whereof the defendant afterwards and within a reasonable time in that behalf, to wit, on the day and year last aforesaid had notice.

To that plea the plaintiff replied *de injuria*, and the jury found their verdict on the issue joined for the plaintiff, with £100 damages.

Mr. *Broadhurst* and Mr. *Fisher* on Monday last moved in arrest of judgment on the second count, on the ground that the contract mentioned in it was void by the *Stat.* 16, Car. II, c. 7. They cited *Benlinck v. Connop* (2), *Thorpe v. Coleman* (3), *Daintree v. Hutchinson* (4), *Applegarth v. Colley* (5), and *Edgebury v. Rosindale* (6).

- (2) 5 Q. B. 693. (3) 1 C. B. 990. (4) 10 M. & W. 85. (5) 10 M. & W. 723.
(6) 2 Levinz 94.

1848. Mr. *Foster*, for the plaintiff, contended that he would not arrest the judgment unless he could perceive that the second count was *necessarily* bad. That the second count did not set up a demand for the amount (£250) of the bet specifically, but disclosed a case for damages by reason of the defendant not having his horse at the course. That for such breach of contract the defendant was at all events entitled to nominal damages. That consistently with the facts stated in the second count, the stakes might have been paid into the hands of the stakeholders, from whom the plaintiff could not obtain them, as the defendant had prevented him from winning the race, and that upon that supposition the statute of Charles could not be applied to the record. He cited *Micklefield v. Hepgin* (7), *Brogden v. Marriott* (8), *Bidmead v. Gale* (9), *Shillitoe v. Theed* (10).

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On a suggestion by the Court, that though the second count disclosed a case for damages for not having the horse on the ground, the plaintiff could not recover them, as the action was not put upon that, but on the ground that the defendant had not paid the bet specifically as would appear from the cases of *Marsh v. Bulteel* (11), and *Head v. Baldry* (12). Mr. *Foster* urged that these cases did not apply, and cited *Chanley v. Winstanley* (13)

We have considered this case, and we are of opinion that had defendant demurred to the second count of the declaration, we must have held it bad in substance, as the transaction therein detailed is void by the statute of Charles. The contract in the second count is, that upon the happening of a certain future event the plaintiff or defendant, as it may turn out, shall pay to the other a larger sum than £100. The case (quoted from *Lievinz*, as reported by *Ventris* under the name of *Hedgeborrow v. Rosenden*, (14), appears to us strictly in point. There (as in the contract stated in the second count) the agreement was precedent to the bet, and the terms of it were that the loser of the two parties shall pay to the other of them. Then the statute was pleaded, but *Bentinck v. Connop* (15), shows that as all the facts contemplated by the Statute appear in the second count, it is bad upon the demurrer. The language used by the Court in the last-mentioned case at pp. 699, 700, we think is immediately applicable to the second count of the declaration in this cause. It appears to us that the words of the statute cannot be limited to cases of express contracts for credit, but

(7) 1 Anstr. 133. (8) 3 Bing. N.C. 88. (9) 1 Wm. Bl. 670. (10) 7 Bing. 405.
(11) 5 B. & Ald. 507. (12) 6 A. & E. 459. (13) 5 East 266. (14) Ventris 253.
(15) 5 Q.B. 693.

that they apply to all cases where the stake amounts to more than £100 and *is not paid down immediately*; and that if it be necessary to enforce the payment (except from a stakeholder to whom it has been paid down) the case is within the words, and certainly the spirit of the Act, the object of which was to restrain gaming, by obliging the parties to play for ready money, if the stakes exceeded £100.

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As then the second count would have been bad upon a general demurrer, has it been mended by the plea and verdict? It has not been aided by the plea, for nothing is thereby admitted without which the plaintiff's case would be defective, as in *Glascock v. Morgan*, cited in *Stephen on Pleading*. That was an action of trespass for taking a hook; the plaintiff omitted to allege in the declaration that it was *his* hook, or even that it was in his possession, and the defendant pleaded a matter in confession, and evidence justifying his taking the hook *out of the plaintiff's hand*, the Court on motion in arrest of judgment, held that as the plea itself showed that as the hook was in possession of the plaintiff, the objection which would otherwise have been fatal was cured. Indeed, the plea (so far from supplying any defect in the declaration) appears to us not even to be a plea in confession and in avoidance, for it is stated in it that the contract set out in the second count was a contract to pay the stakes into the hands of a stakeholder, before the race, and not, as the plaintiff stated, a contract for the money to be paid by the one to the other after the determination of the race. The plea, might, therefore, have been demurred to specially; but we think the replication, though inappropriate in point of form (as the plea was a traverse of the contract, entered in the second count, and not a plea in confession and avoidance, consisting only of matter in excuse) has substantially put in issue all the matters alleged in the plea. The verdict having, therefore, negatived all matters alleged in the plea, they may for the purposes of the question before us be considered obliterated from the records.

With regard to the case as it stands, upon the time and manner in which the objection has been taken, viz., in arrest of judgment, *Mr. Foster*, which mainly in the language of *Eyre, C.B.*, in the case in *Anstruther* (16). The *Chief Baron's* observations were:—"This case turns upon the manner in which the objection has been taken. In a motion in arrest of judgment we cannot seek to impeach the verdict, but the wager must appear to be necessarily void, otherwise we will now presume the verdict right. The wager must at the time of making

(16) 1 Anstr. 133.

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it be either good or bad ; but it is from the manner of pleading only that it appears on the record to be either the one or the other. If the pleadings state only so much of a transaction as is legal, and that the other part appears in evidence to be illegal, it is a proper ground of nonsuit, or of granting a new trial ; or if put on the record by means of a special verdict, the Court can decide upon it. But here the wager, as stated in the declaration, does not *necessarily* imply an imputation on anybody." A part of the foregoing observations, viz., "if the pleading state only so much of a transaction as is legal, and the other part appears in evidence to be illegal, it is a proper ground of nonsuit, or of granting a new trial," we may as well intimate, for future guidance, is not the law since the new rules of pleading, as such other illegal part must now be pleaded specially, *Fenwick v. Laycock* (17).

The effect of the decision in *Anstruther* is this, that on a motion in arrest of judgment, the Court is not to look out of the record, and really amounts to this, that if the pleadings state only so much of a transaction as is illegal, the Court will not adjudge it valid by combining with it other facts, which, though not stated on the record, they may conceive to have had a possible existence. As the verdict has done no more than negative the facts averred by the defendant in his plea, it is impossible for us to intend, from that verdict, that any fact essential to the plaintiff's case was proved in evidence, so as to satisfy any general averment in the second count of the declaration. A verdict cannot import into a declaration a new fact, though it may show that an essential fact defectively stated in the declaration was properly proved at the trial. "The extent and principle of an *aider by verdict*" (says *Sergeant Stephen*) is thus explained in a modern decision, *Jackson v. Peaked* (18), of the Court of King's Bench. "Where a matter is so essentially necessary to be proved, that had it not been given in evidence, the jury could not have given such a verdict, then the want of stating such matter in express terms in a declaration, *provided it contain terms sufficiently general to comprehend it in fair and reasonable intendment*, will be cured by a verdict ; and where a general allegation must, in fair construction, so far require to be restricted, that no Judge and no jury could have properly treated it in an unrestricted sense, it may reasonably be presumed, after verdict, that it was so proved at the trial." In fine, a verdict aids by showing that a fact stated on the record was necessarily proved by evidence of circumstances which should have been alleged on the pleadings as constituting the particular

fact. We think, therefore, that the second count of the declaration is unaided either by the plea or the verdict thereon, and that, as claiming the amount of the bet, it is bad, as being within the statute of Charles. 1848.

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With regard to the argument that the cause of action is not for the amount of the bet, but for damages for the defendant not having his horse on the course, we answer it by replying to the question put at page 97 of 10 M. and W., by Baron Alderson, "Can a contract which, if carried out, could not be enforced so far as to make a contracting party pay for not carrying it out," in the negative, for this reason, that in such a case the party might recover by action indirectly the amount of that bet, which the statute says he shall not obtain directly by suit in any Court. In conclusion, we arrest judgment on the second count, but we wish to observe that even if we could upon this motion in arrest of judgment intend that the £250 had been paid into the hands of a stakeholder, and the cause and ground of action were the defendant's preventing the plaintiff from winning the stake by not producing his horse to run, yet we must not be understood now to decide that such an action would lie, if the stake got into the hands of the holder, in pursuance of a contract to pay the amount, made previously to the time appointed for the race. In *Daintree v. Hutchinson* (19), a contract to pay the plaintiff £100 on a race, or to run a race for £100, was held to be illegal, and consequently an unenforceable contract. But the statute might possibly be considered effectually evaded, if contracts for racing could be legalised merely by making the bargain to pay the money to a stakeholder. If such a contract could not be enforced on non-payment of the stakes by one to the other party to a bet, it might be held that the stakeholder (if the money were actually paid) could set up the illegality of the contract, under which the money got into his hands, in order to an action by the winner of the race to recover the amount from him. See *Applegarth v. Colley* (20).

Judgment arrested.

(19) 10 M. & W. 85.

(20) 10 M. & W. 723.

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REGINA v. TOWNEND. (1)

Jan. 3.
Stephen C.J.
Dickinson J.
and
Therry J.

Arrest of judgment—Demurrable point cured by 7 Geo. IV, c. 64—Description of prisoner's masters—Judgment on counts sustained on appeal—Challenge—Indictment charging more than three offences—Two embezzlements against different masters.

On a motion in arrest of judgment the record alone can be looked to.

The descriptive allegation in an indictment for embezzlement, that the money taken was the property of "The Commercial Banking Company of Sydney, his masters, &c." (an unincorporated Bank), is not sufficient, and at the proper stage may be demurred to, but, after verdict, is cured by 7 Geo. IV, c. 64.

An allegation that the money was the property of "*L. Duguid* and others his partners, the masters, &c." renders the count bad; and (*per the Chief Justice and Therry, J.*) is not cured by verdict; (*per Dickinson, J.*) the defect is cured by the statute.

Where there are several counts, some of which have been held to be good, and some bad, the Court can pass sentence upon the good counts.

An objection that an indictment is bad, because of six distinct offences being charged therein, is of no avail in arrest of judgment, though at the trial the Crown may be called upon to elect.

The Crown having challenged a juryman on the ground that he is one of the prisoner's bail, and the objection being overruled, is entitled to take another objection, that the juryman is not an "indifferent party."

It is a good objection (on a point reserved) to two counts that they allege the money, embezzled on different occasions, to be the property of the Bank in the same terms, the proprietors of the Bank being constantly changed, but sentence may be passed on the prisoner on a good count.

The prisoner was indicted for that he, on the 29th day of April A.D. 1847, and within six calendar months of the time respectively of committing the respective offences mentioned in the second and third counts of this information, at Sydney, &c., being then and there employed as clerk to the Commercial Banking Company of Sydney, did, by virtue of his said employment, and whilst he was so employed as aforesaid, receive and take into his possession, a certain sum of money, to wit, £103, for and in the name and on account of the said Commercial Banking Company of Sydney, his masters, and the said money then and there, and within six calendar months of the times respectively of committing the respective offences mentioned in the second and third counts this information, fraudulently and feloniously did embezzle.

(1) *The Sydney Morning Herald*, Jan. 5, 1848.

And so the said Attorney-General says that the said *Townend*, the said money, the property of *Leslie Duguid*, the Managing Director for the time being of the said Commercial Banking Company, &c., as such Managing Director of the said Company, then being the masters of the said *Townend*, from the said *L. Duguid*, feloniously did steal, &c.

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The second count was similar to the first, except that the amount, alleged to have been embezzled, was stated to have been £150, and the day on which the embezzlement took place was stated to have been the 5th day of June, A.D. 1847.

The third count was similar to the two former, with the exception that the sum, alleged to have been embezzled, was stated to have been £50, and the day on which the embezzlement took place was stated to have been on the 10th of June, 1847.

The fourth count stated that *Townend* was clerk to *L. Duguid* and others, his partners, and that by virtue of his employment, and that whilst he was so employed, and within the period of six calendar months, the said *Townend* did receive, &c., and take into his possession, the respective sums of £103, £150, and £50, for and in the name and on account of *L. Duguid* and others, his partners; and that on the 19th day of April, the said *Townend* did embezzle the sum of £103, that on the 5th day of June the said *Townend* did embezzle the said sum of £150, and that on the 10th day of June the said *Townend* did embezzle the said sum of £50.

At the trial, as to the third count, and to so much of the fourth count, as related to the sum of £50, the prisoner pleaded *autre fois acquit*, and issue being joined thereon, a verdict was found in favour of the prisoner.

The trial then proceeded on the rest of the information, and the Jury, after considering their verdict for some hours, returned a verdict of "Guilty."

On the request of the attorney for the prisoner, His Honor Mr. Justice *Dickinson* asked the Jury if they found the prisoner guilty on both charges, or having embezzled both sums. The Jury answered "yes," and the Clerk of Arraignment then entered into the "minute-book," "guilty of having embezzled both sums."

Certain points having been reserved for the consideration of the Full Court, and others now taken in arrest of judgment, the case now came on for argument.

1848. The *Attorney-General* and the *Solicitor-General*, for the Crown.

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Michie, for the prisoner, argued that the verdict was insensible, as, after the plea of *autre fois acquit*, there remained four distinct charges, while the prisoner was found guilty of having embezzled "both sums." A verdict of not guilty should have been entered on two of the charges. For pleading purposes all the sums were distinct. *R. v. O'Connell* (2).

THE COURT held that there was nothing in the point on a motion for arresting the judgment. Looking to the record, and which only could be looked to for the purposes of this motion, it appeared that there had been returned a general verdict of guilty. It was intimated that perhaps the verdict was inconsistent for that reason, but this was not the mode of taking that objection.

Michie, then, in arrest of judgment, argued that the first and second counts were bad, for that the description in each of them, "the Commercial Banking Company, as the masters of the prisoner," and "*L. Duguid* as the managing director of the said bank, &c." were as bad as if no description were given at all of the parties entitled to prosecute, and they did not satisfy the well known ingredients of all indictments. The description of the bank was no better than to have inserted the "XX brewery, &c." It was urged that the Commercial Banking Company was not an incorporated body; on the contrary, the Act declares it shall not be so; therefore it was submitted that the names of all the proprietors, no matter how numerous they might be, ought to have been set out in each count. *Beacall's case* (3); and *Sherrington and Bulkley's case* (4).

The fourth count also, it was contended, was bad for a similar reason, and similar arguments were used. Here the allegation was that the money was the property of "*L. Duguid* and others, his partners, the masters, &c." It was urged that those who were the masters, the partners, ought to have been specifically stated by name, for suppose it should happen that the prisoner were tried on a fresh indictment, for the identical offences, and this latter indictment should set out the names of the masters, to which the prisoner pleaded *autre fois convict*, how would it appear that the prisoner had been before tried for the same offences? Again, the Legislature authorised the putting three charges of felony in the same "indictment," but the word "count" is not to be found in the language of the Legislature; here there were three different

(2) 11 C. and F. 155.

(3) 1 Ryan & Moo. 15; 1 C. & P. 310.

(4) 1 Leach, 513.

offences charged in the fourth "count," and, therefore, this count was bad. *Lastly*, and which went to the whole information, there were six different offences charged in the same indictment, which was contrary to the statute.

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THE CHIEF JUSTICE, without calling upon the other side, delivered his opinion on the above points; stating that he was of opinion that the descriptive allegation of the Commercial Bank, &c., was not sufficient, and at the proper stage it might have been successfully demurred to, but now, after verdict, the defect had been cured by Sir *R. Peel's* Act, 7 Geo. IV, c. 64. As to the similar objection raised to the fourth count, His Honor said there had not been any sufficient description of the partners, &c., and that the objection was even now good after verdict. But His Honor said that, independent of the decision in *O'Connell's case* (5), he was of opinion that where there were several counts, some of which have been held to be good and some bad, the Court could pass sentence upon the good counts. And as to the other objection, viz., that the indictment was bad because of the six distinct offences being charged, His Honor said that objection would not now avail; at the trial the Crown might have been called upon to elect, which was not done; and in point of fact, if the Court is now called upon to arrest judgment generally, because the prisoner has been found guilty of embezzling four sums, we are not to pass sentence upon him for one offence.

DICKINSON, J., agreed generally with His Honor *the Chief Justice*, but went further in deciding that the fourth count was now good, and at any rate was cured by the statute.

TERRY, J., concurred generally with *the Chief Justice*.

Michie then argued the points reserved at the trial, viz.—first, as to the right of the Crown, to challenge for grounds stated at different times, to one jurymen. At the trial the *Attorney-General* challenged a Mr. *Whitfield*, as a jurymen, on the ground of his being one of the bail for the prisoner, &c., and upon his Honor overruling the objection, the *Attorney-General* took another ground of challenge, viz., that Mr. *Whitfield* was not an "indifferent" party. An issue was raised on this and submitted to a jury, who found that Mr. *Whitfield* was not an "indifferent" party. It was now contended that all the challenges a man may have must be taken at once. *Co. Litt. 1 Inst.*, Lib. 2, c. 12, p. 158 (a) and *Bac. Abr. Tit. Juries*, 572.

1848. The COURT overruled this objection, intimating that *Coke* was not always an authority, and that they, in this instance, would rather lean to the authority to be found in *Trials per Pais*, 199, which warranted the course adopted, and would prefer looking to the reason of the practice that ought to obtain, which would prove also that the course adopted is the most consistent.

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Michie. The confession of the prisoner ought not to have been admitted, as it was obtained from him under the influence of a promise, that it should not be used against him.

The COURT admitted the rule, but held that the confession in this case did not come within it.

Michie then took the following points—that the Crown officers having refused to elect in the course of the trial, though warned to do so by the prisoner's counsel, had rendered the trial of no avail. It was submitted that it appeared in evidence, that the proprietors in the Bank changed weekly, almost daily, and therefore the two offences charged and left to be tried, could not have been committed against the same masters—thus the language of the statute had not been complied with. And, lastly, that there was no evidence to show that any specific sums of money had been embezzled. *R. v. Chapman* (6).

The Attorney-General, contra.

The CHIEF JUSTICE, in giving the judgment of the Court on these two points, said there was some weight in the first objection, but it could not impeach the first count, though it might the second and third, indeed there was a difference on the bench as to that point, and in consequence only a nominal sentence would be passed on the second and fourth counts. As to the second point, his Honor said that this case was distinguishable from the case quoted.

DICKINSON, J., then passed sentence.

[IN INSOLVENCY.]

1848.

March 1.

In re WHITTELL. (1)Stephen C.J.
and

Dickinson J.

Insolvency—Landlord's preferential claim—8 Anne, c. 14, ss. 6 and 7—Wages and piece-work.

A landlord can only establish a preferential claim under sec. 41 of the Insolvent Act, 5 Vic., No 17, for such rent as he could have distrained for.

Having determined the lease, in pursuance of a clause authorising him to do so, and entered on the demised premises, he was not in a position to distrain at the time of the sequestration order, unless by 8 Anne, c. 14, sec. 6, the terms of which, *Seemle*, only apply to the determination of a tenancy by lapse of time, or perhaps by notice to quit. The Statute of Anne, however, by sec. 7, only applies during the continuing possession of the insolvent.

Miners working by the job or piece can only rank with the general body of creditors, and not preferentially as for wages.

MOTION to make absolute a rule *nisi* calling upon Messrs. *Robey*, *Street*, and *Lees*, to show cause why the plan of distribution in this estate should not be altered as to their respective debts.

Broadhurst, for the Official Assignee, submitted. *Michie*, for Mr. *Robey*. It was stated and admitted that *Robey* had leased under seal to the insolvent a coal mine, rent payable monthly, with powers to *Robey* to determine the lease on the happening of certain circumstances, one of these being an assignment of the lease by the insolvent, or by the operation of law.

The insolvent assigned in trust for his creditors in July, and in August *Robey* gave notice of his exercise of the power, and took possession in September, six days before the sequestration order.

James Street and *George Lees*, who appeared in person, contended that it was the custom of miners to do work by the job or piece, and that they ought to be considered as servants.

Fisher, in reply.

The judgment of the Court was delivered as follows :—

1. We are of opinion, that by s. 41 of the Insolvent Act, a Landlord can only establish a preferential claim, for such rent as he could have

(1) *The Sydney Morning Herald*, March 2, 1848.

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distraigned for. The introduction of the word "*but*" appears to us indicative of an intention, in the Legislature, to provide for the Landlord a larger benefit than other creditors, in substitution for his remedy by distress. The clause provides, that the Landlord to whom "*the*" Rent is due, shall be entitled, &c. But the only rent to which the article *the* can apply, is that Rent in respect of which a Distress is, by the same clause, taken away. It seems to us to follow, that no rent for which a Distress could not have been levied, is within the enactment.

2. It is clear, however, that the Landlord in this case was not in a position to distrain, at the time of the Order made for sequestration (he having before that time determined the Lease, in pursuance of a clause enabling him so to do, and entered on the demised premises accordingly), unless he was enabled to distrain by virtue of the Statute 8 Anne, c. 14, s. 6—And, as to this, having regard to the preamble to that section, and to the terms of the following section, and to the case of *Doe v. Williams* (2), we are strongly inclined to think that the enactment applies only to the determination of a tenancy by lapse of time; or, perhaps, by notice to quit.

3. But, supposing that the enactment 8 Anne, c. 14, s. 6, would apply to the case of a determination like the present, it is clear that by s. 7 the distress could only be made during the *continuing possession of the insolvent*. *Taylorson v. Peters* (3). The landlord had himself taken possession; and there is nothing to show, that any possession whatever remained in *Whittel*, but the contrary.

The result is, that the plan of distribution in this case must be altered, by the ranking of the landlord's claim (as well as the claims of the two miners), as claims payable *pari passu*, only, with the general body of the creditors, and not as preferential claims. The assignee ought, we think, to get his costs out of the assets. All other parties will pay their own.

(2) 7 C. & P. 322.

(3) 7 A. & E. 110.

GOSLING v. GROSVENOR. (1)

1848.

Variance—Sheriff's lawful deputy—Writ directed to Sheriff or deputy—Charter of Justice, XIII.

Apr. 7.

Stephen C.J.
Dickinson J.
and
Manning J.

A writ of *ca. sa.* was issued, directed to the Sheriff or his deputy, and delivered to the Sheriff, who gave a warrant thereon to his bailiff. *Held*, the bailiffs authority was under the warrant alone, and the arrest by him, for the Sheriff, was an arrest by the Sheriff himself, under the writ, by his Deputy. But no variance was held to be caused by an allegation that defendant was taken in execution under the writ by M., the lawful deputy of the Sheriff, for the Sheriff's warrant in effect, authorised the bailiff to act under the writ, and therefore the arrest by him was equally under the writ, (*per* the Chief Justice, and Manning, J., Dickinson, J., *dissentiente*).

SPECIAL case. This was an action by trustees of an insolvent upon a judgment recovered by him against the defendant. The defendant pleaded that, before the sequestration, a writ of *ca. sa.* issued upon the judgment in question, directed to the Sheriff, or his lawful deputy; and that the defendant was taken in execution under it by one *Money penny*, the lawful deputy of the Sheriff in that behalf. A verdict by consent was entered for the defendant, subject to the opinion of the Full Court upon a special case, stated on certain admissions.

The *Solicitor-General* and *Fisher* moved to set aside the verdict. The defendant must prove all his averments. The arrest was not under the writ, but by a warrant issued by the Sheriff. The writ did not come into the hands of the deputy.

Darvall, contra. The plea was proved in substance. He cited the practice of the Court, and sec. 13, Charter of Justice.

The CHIEF JUSTICE. I am of opinion that the defendant is entitled to hold his verdict. The Writ being addressed (however erroneously or unnecessary to the Sheriff or his Deputy, it might have been executed by the Deputy under the writ itself, and without any authority from the Sheriff, had it been delivered to the Deputy. But it was not so delivered. The Writ is not addressed to the Sheriff and Deputy, jointly and severally. Had it been so addressed, the previous delivery to the Sheriff would not have defeated the Bailiff's inherent original authority under that Writ. But the writ was directed to the Sheriff or his Deputy, and it was delivered to the Sheriff, not the Deputy; and the Sheriff acted on it, by giving a warrant thereon to his Bailiff, being his lawful Deputy in

(1) *The Sydney Morning Herald*, April 8, 1848.

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that behalf, by whom, by the Common Law, as incident to his office of Sheriff, and also by the Charter, the Sheriff is entitled to execute Writs. The bailiff, from that time, had no authority under the Writ but the Sheriff only. The bailiff's authority was under the *Warrant alone*, and the arrest, under it, was consequently an arrest by him (the bailiff) for and on behalf of the Sheriff, and as the Sheriff's Deputy, and so was an arrest by the Sheriff himself, under the Writ, by his Deputy. Then comes the question, having regard to the precise terms of the *Issue*, whether the arrest can be taken to be an arrest *by the bailiff* "under the Writ." The allegation is, not that *the Sheriff* took under the Writ, a fact that would have been established by the acting of the bailiff. But the allegation is, that the arrest was *under the Writ, by the bailiff*. I think, that it was an arrest by him under the warrant. But, I think that it was nevertheless equally an arrest by him under the Writ, for the Sheriff's warrant, in effect, (though its terms, if we adhere to the letter of them only, are not precisely so, but I say, *in effect*) deputed the bailiff to act under the Writ, and without the Writ the arrest would have been invalid and unlawful. The allegation is, that Mr. *Money penny* "*then being the lawful Deputy of the Sheriff in that behalf*" took the defendant under the Writ. That is, the bailiff being deputed (or authorised) by the Sheriff so to do, acted under the Writ. I regard the allegation as amounting to an assertion of two things, first, a Deputation by the Sheriff, to execute the Writ, and secondly, an acting under (or in other words executing) the Writ, by virtue of that Deputation. Whether that be the proper allegation, or form of allegation, is not now the question: but only whether the plaintiff did, or did not, in fact, being the person deputed so to do, act under the Writ, and I am of opinion, on the admissions, that he did so act. If so, he acted *by virtue* of the Writ, within scope and meaning of the allegation, as explained by the context. The bailiff by virtue of the Writ, *as Deputy of the Sheriff* acted under it.

DICKINSON, J., said he could not agree with the rest of the Court in the decision that had been come to. He was of opinion there was a variance between the allegation, by virtue of which writ the said deputy, &c., and the evidence in support of it. He was of opinion that the deputy could not have acted on the writ alone, he could only have acted by a lawful deputation from the Sheriff, which is not averred to have been the case in plea.

MANNING, J., delivered judgment in accordance with the judgment of His Honor the *Chief Justice*.

Verdict for the defendant upheld.

SMITH v. BARTON. (1)

1848.

*Nonsuit—Judge's direction when nonsuit refused—Action against Magistrate—
Larceny—Evidence—Recitals.*

July 3.

Stephen C.J.
Dickinson J.
and
Manning J.

In an action against a magistrate for trespass for false imprisonment the plaintiff proved a warrant, issued by the defendant, to search the plaintiff's house for stolen goods, and if found therein, to arrest the plaintiff (under which warrant the plaintiff was arrested), and reciting an information on oath before the defendant, and that there was good reason to suspect, &c. The Judge granted a nonsuit, which was refused by the plaintiff, and a verdict was given by the Jury, on the direction of His Honor, for the defendant, who had tendered no evidence.

The questions were afterwards raised on motion for a new trial, whether the plaintiff, by putting in the warrant, established also a justification of the defendant by the recitals therein, and whether the Judge's *direction* to the Jury to find a verdict for the defendant was right. A new trial was refused by majority (the *Chief Justice* dissenting).

Held (per *Dickinson* and *Manning*, JJ.) that the recitals were *some* evidence of the facts on which the magistrate's jurisdiction was based, and could not be discredited gratuitously, without grounds for suspicion; and that the non-production of the information by the defendant was no reason for such suspicion. The Judge's opinion having been rightly given that the plaintiff ought to be nonsuited, his direction to the Jury was also right; (per *Dickinson*, J.) that unless it was clearly shown that His Honor's direction was wrong, the verdict should not be disturbed; (per *Manning*, J.) if it could be clearly seen that the proper conclusion of fact had been arrived at, an error in the charge, if any, should not upset the verdict; (per the *Chief Justice*) no presumption arose in the defendant's favour, from his having acted as a magistrate, to confer jurisdiction on him, and the existence of jurisdiction must be proved; the recital that there was an information must be taken as true, and was *some* evidence that the information established a case of larceny against the plaintiff; but the Jury was not bound to believe the defendant's own assertion, and the question was for them, not the Judge.

The direction of a nonsuit was only to be regarded as equivalent to the expression of an opinion that the jury would or ought to find a verdict for the defendant. A new trial should be granted, even though no injury had been done, as a great principle was involved.

THE facts and argument in this case are set out in the judgment of the *Chief Justice*.

THE CHIEF JUSTICE. This was an action of Trespass for False Imprisonment, tried before Mr. Justice *Manning*, at the last Bathurst Circuit; to which the defendant, under statute 21 Jac. I. c. 12, pleaded the General Issue.

It appeared, that the plaintiff was arrested under a search warrant, issued by the defendant as a Justice of the Peace, and addressed to the

(1) *The Sydney Morning Herald*, April 11, July 7, 1848.

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Chief Constable of the district ; which warrant, (being in the usual form given by Burns' Justice) was in the following words:—"Whereas it appears to me, *Robert Johnstone Barton*, Esq., one of Her Majesty's Justices of the Peace for the colony of New South Wales, by the information on oath of *Samuel Phillips*, that certain goods (to wit) one iron pot have been feloniously taken, stolen, and carried away, out of the premises of *Samuel Phillips* in the said colony, and that there is good reason to suspect that the said goods, or part thereof, are concealed in the dwelling-house or on the premises of *John Smith*, of Gamboola ; these are therefore, in Her Majesty's name to authorise and require you, with the necessary and proper assistance, to enter in the day time into the said dwelling-house and premises of the said *John Smith*, at Gamboola, in the said colony, and there diligently search for the said goods ; and if you find them or any part thereof, that you bring them together with the body of the said *John Smith* before me, or some other of Her Majesty's Justices of the Peace, to be dealt with according to the law." It further appeared, in course of the plaintiff's evidence, that the said *Samuel Phillips* mentioned in the warrant made some statement before the defendant ; which the Clerk to the Bench took down in writing, and to which *Phillips* was sworn ; and upon that (said the witness) the warrant was granted. The warrant was afterwards executed ; and, in obedience thereto, (the iron pot mentioned having been found on his premises) the plaintiff was taken into custody.

On this evidence, the *Attorney-General* for the defendant moved that the plaintiff should be nonsuited. The Judge reports, that he expressed his opinion in favour of that motion. His Honor referred to the fact, that a complaint on oath had been made before the defendant, who was a magistrate ; and that the warrant issued upon that complaint, which warrant was good on the face of it, and recited facts sufficient to justify the arrest. His Honor observed, that the defendant was not connected with the arrest except by that warrant, and that, by its being put in evidence, the recitals were made evidence by the plaintiff against himself. And he added, that the fact so established, aided by the general presumption (*omnia rite esse*, &c.) in favour of persons acting in a public capacity, appeared to him to prove a justification, quite as clearly as they showed a *prima facie* trespass. Mr. *Lowe*, however, for the plaintiff, refused to be nonsuited ; and the *Attorney-General* then addressed the Jury for the defence, calling no witnesses. The Judge told the Jury that consistently with what he had just held, he could leave no fact to them, and he therefore directed them to find for the defendant. His Honor said that, as the plaintiff refused to be nonsuited, it rested with them to give a verdict, and that they had the

power to return one not in accordance with his direction; but that, if they did so, they would be exceeding their province. He then made some remarks on the evidence, in the course of which he observed, that the information was equally available to the plaintiff, as to the defendant.

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For that direction of His Honor, and those remarks accompanying it, (the Jury having returned their verdict for the defendant,) Mr. Lowe moved during the last term, for a new trial. He contended, that the recital in the warrant was no evidence, that an information had been laid, as there alleged; and that, if it were evidence at all, the Judge should have left it to the Jury, to consider its value under all the circumstances, particularly with regard to the fact, that the defendant had not produced the information in his defence. At any rate, there was (he maintained) no *presumption* in favour of such recital. He drew a distinction between statements, made in the course of some conversation or writing, which is given in evidence against a party as an *admission*, and similar statements contained in a document which is unavoidably put in merely as a *medium of proof*, e.g., to connect a defendant with the act complained of. Mr. Lowe cited passages from *Star. on Ev.* (vol. 1, p. 416, and 3 p. 957); *Davies v. Morgan* (2); *Grey v. Smith* (3); *Rogers v. Jones* (4); *Phillips on Evidence*, (ed. 8) 471; *Groenvelt v. Burwell* (5); *Case of Marshalsea* (6); *Parton v. Williams* (7); *Price v. Messenger* (8); *Stevens v. Clarke* (9); and *Rex. v. the Inhabitants of All Saints* (10).

The *Attorney-General* and Mr. *Broadhurst* for the plaintiff, contended on the contrary that as the warrant was good on the face of it, the recital was conclusive evidence for the defendant. But they observed, there was further proof in the fact, that an information really was taken, and that, according to the witness, on that information the warrant issued. They referred to the Search Warrant Act of 22 Geo. III, c. 55; *Cave v. Mountain* (11); *Carratt v. Morley* (12); *the Queen v. Silkstone* (13); *Taylor v. Clemson* (14); *Brittain v. Kinnaird* (15); *Mills v. Collett* (16); and *Williams v. the E. I. Company* (17).

We have considered the several authorities cited, and many others, among which are the following:—*Com. Dig. Trespass*, C. 2; *Strickland v. Ward* (18); *Welch v. Nash* (19); *Gray v. Cookson* (20); *Caudle v.*

(2) 1 C. & J. 587. (3) 1 Camp. 387. (4) 3 B. & C. 409. (5) Comyns' Rep. 79.
(6) 10 Rep. 76. (7) 3 B. & Ald. 330. (8) 2 B. & P. 159. (9) 1 Car. and
Marsh 509. (10) 7 B. & C. 785, 790. (11) 1 M. & Gr. 257. (12) 1 Q. B. 28.
(13) 2 Q. B. 520. (14) *Ibid.* 1013. (15) 1 B. & B. 432. (16) 6 Bing. 89. (17) 3
East 192. (18) 7 T. R. 633, in *notis.* (19) 8 East 394. (20) 16 East 13.

1848. *Seymour* (21); *the Queen v. Bolton* (22); *Mould v Williams* (23); *Hales v. P. C.* 150; *Lowther v. Earl of Radnor* (24); *Goss v. Quinton* (25);
 SMITH *Haynes v. Hayton* (26); and *Bessey v. Windham* (27). We are not
 v.
 BARTON. unanimous in our opinions, and it is necessary for us, therefore to deliver
 Stephen C.J. judgment separately.

The question at the trial was not, whether the magistrate was right in the conclusion which he drew, as to the fact that a larceny had been committed, or that there was ground, on the information alleged to have been before him, to suspect that the stolen goods were on the plaintiff's premises. It may have been intended to raise those questions, or one of them, in case the information had been produced. But the plaintiff contented himself with showing a *prima facie* case, which he did, by connecting the defendant with the warrant, under which the arrest was in fact made. The only question was, whether his counsel did or not, by putting in that warrant, establish also a justification. But in that question two points are involved, first, whether he thereby made the recitals in the warrant evidence for the defendant; and, secondly, whether they were, under the circumstances, conclusive evidence, so as to leave no question for the Jury to try. On the first of those questions, I conceive that the Judge was clearly right; but, on the second, I am of opinion with the plaintiff.

It appears to me, that that those were the only two questions at the trial. I quite agree with Mr. *Lowe*, that no presumption arose in the defendant's favour, from the mere fact of his having acted as a magistrate, for the cases clearly show, that no presumption arises to confer jurisdiction. Justices of the Peace, no doubt, have jurisdiction in cases of larceny. So, where a larceny has been committed, or there is an oath made that one has been committed, they have jurisdiction to issue a search warrant. This authority, it was supposed at the bar, rests on the 23 G. III, c. 58. That statute, however (though the fact does not seem to be generally known), was repealed by the 7 & 8 G. IV, c. 27, and the power of issuing a search warrant, in cases of larceny, depends at this day, therefore, either on the Common Law, or the 7 & 8 G. IV, c. 29, s. 63. That section seems rather to have been framed, to meet cases not of larceny, strictly speaking, but offences in the nature of or akin to larceny, created or made punishable by that statute. Looking at what Sir *Matthew Hale* says, however, in the place cited above, I take it that the jurisdiction, in a case (as here) of larceny, exists at Common Law;

(21) 1 Q. B. 889. (22) *Ibid.* 66. (23) 5 Q. B. 469. (24) 8 East 119, 122.
 (25) 3 M. & Gr. 825. (26) 6 L. J., K. B. 231. (27) 6 Q. B. 172.

and that learned author not only upholds it, as essential to the investigation of the crime, but lays it down as law that, where stolen goods are found under the warrant, the party in whose possession they are, should be taken with them. He adds, that the issuing of such a warrant is a judicial act, and the reason assigned is, that it is a matter of discretion when it shall be granted, as well as whether ground has been laid for it. The conclusion appears to me to follow, that the warrant in this case was a valid one in point of law. It recites, that an information on oath had been made before the defendant, by which it appeared to him that a larceny had been committed, and that there was good reason to suspect that the property was on the plaintiff's premises. Still, the existence of jurisdiction—that is (to borrow the language of *Coleridge, J.*, in *Caudle v. Seymour* (28), not jurisdiction in the abstract, but in the particular case, remains to be established. Now that depends on a question of fact, namely, whether such matter existed, as was sufficient to authorise the inquiry entered on. What, then, was that matter? It was, I apprehend, that an information on oath had been made, whereby a larceny appeared to the defendant to have been committed. That those facts existed, had to be shown, for unless they did exist, the defendant had no authority to determine whether a search warrant should issue or not. The question is, *were* they shown? If they were, the correctness of the defendant's adjudication (namely, that there was good reason to suspect, that the goods were concealed on the plaintiff's premises), could not be disputed. The law as to this is too clear for dispute. Where any Tribunal, whether that of a Justice of the Peace, or any other, has jurisdiction over a particular matter, the accuracy of its decision can be questioned only by appeal, or some proceeding known to the law, in the nature of an appeal. [See the cases of *Brittain v. Kinnaird* (29), *Mould v. Williams* (30), and *The Queen v. Bolton* (31), already mentioned.] But to suppose that a magistrate can be made liable to an action, for any such wrong conclusion would be monstrous. If such a liability existed, no one would be safe in undertaking the duties of a magistrate. A false statement, or act done without evidence, would stand on a very different footing; though I do not say, that *Trespass* will always lie even in cases of that kind. That any such statement or act was imputed, however, or meant to be imputed, in this case, does not appear. But, be that as it may, the question at the trial, as I have shown, was as to the *existence of jurisdiction*; and nothing more.

To acquire that jurisdiction, it seems to me that the taking of an information, merely, unless that information showed the commission of

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(28) 1 Q. B. 889. (29) 1 B. & B. 432. (30) 5 Q. B. 469. (31) 1 Q. B. 66.

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a larceny (or, at all events, of an offence of that nature, punishable by the larceny statute), would clearly be insufficient. I will assume, for instance, that an information on oath was in fact taken, but that it disclosed a case of trespass only. It could hardly be contended, that calling that a larceny will alter the nature of the case, so as to confer a jurisdiction, which would not have existed otherwise. If, indeed, the information distinctly charged or showed a case of larceny, or circumstances from which the fact of a larceny could be inferred, the jurisdiction doubtless did attach; and then, as in every similar case where jurisdiction once has arisen, the magistrate could not afterwards be made responsible, because either the information might prove to have been false, or mistaken. In like manner, as already observed, if he have once acquired jurisdiction, in any matter, his judicial conclusions as to that matter, however erroneous, if honestly arrived at, subject him to no penal consequences,—nay, and are, until reversed, binding on all the world. Here, however, the question being *the existence of jurisdiction*, to which an information showing larceny is essential, we have to consider what evidence, if any, there was of such an information.

I am of opinion, then, in the first place, that there clearly was *some* evidence of such an information. The case mainly relied on by Mr. *Lowe* before us, to show that the recitals in the warrant furnished no evidence for the defendant, was *Stevens v. Clarke* (32), a case, certainly, almost identical with the present. The warrant there was put in by the plaintiff, it contained a recital of an information on oath, there was oral testimony, that some information on oath really had been taken; and it was then insisted, for the defendant, that the recital in the warrant must be *prima facie* to be taken to be true. Mr. Justice *Creswell*, however, “after inquiring whether there was any authority for holding, that a warrant was evidence of the truth of its recitals, said that in the absence of any such case he was of opinion, that it was no proof of an information on oath.” The case of *Glave v. Wentworth* (33) might have been added. There, to fix the defendant, a sheriff, his warrant was put in, which recited a writ of *feri facias*, but Baron *Parke* held, that it lay on the defendant to produce that writ, thus holding that the recital was no evidence for the Sheriff. Both those *Nisi Prius* decisions, however, are inconsistent with the cases of *Haynes v. Hayton* (34), and *Goss v. Quinton* (35), which I have mentioned as among those consulted by us, and must in fact be considered overruled by those cases, and by the recent one of

(32) 1 Car. & Marsh 509.

(33) 6 Q.B. 173, *in notis*.

(34) 6 L.J., K.B. 231.

(35) 3 M. & Gr. 825.

Bessey v. Windham (36). The first of these three cases was an action against the Sheriff for money had and received, and the plaintiff, to fix him with receipt of the money, gave in evidence a letter from the undersheriff. In that letter the receipt of the money was admitted, but the writer went on to mention, that it had been levied by a writ issued against the plaintiff, by authority of the Court of Quarter Sessions, as for a forfeited recognizance. Mr. Justice *Parke* held, at the trial, that the letter was evidence equally of the authority, under which the money was levied, as of the receipt of the money,—and, there being nothing to show the illegality of the levy, the plaintiff was nonsuited. On a motion for a new trial, that ruling was sustained by the King's Bench; Lord *Tenterden* observing after reading the letter, “You are to make this evidence against the Sheriff, and yet not give him credit for an assertion there made, which is in his favour. This seems to me to be the hardest measure possible.” In *Goss v. Quinton* (35), the plaintiffs gave in evidence an examination of the defendant before the Commissioners in Bankruptcy, to prove that he had taken the property, in respect of which the action was brought. In the course of that examination (or, rather, on his cross-examination, in answer to a question from his own attorney), he stated the substance of a written agreement which furnished matter of defence to the action. The Court of Common Pleas held that, by putting in the examination, the plaintiff had made the whole of it evidence, and that the defendant's statement was therefore some proof of the agreement relied on, although he neither produced it nor accounted for its non-production. In *Bessey v. Windham* (36), which was an action against a sheriff, the plaintiff put in the defendant's warrant, reciting that it issued on a *fieri facias*. The Court held that the warrant thereby was made evidence of the writ, Lord *Denman* saying, in delivering judgment, “The proof of seizure involved some evidence of its having been made by authority of law, and such evidence as leaves no possibility of doubt as to its truth.” There are other cases to the same effect. In *Randle v. Blackburn* (37), it was held that where a person admitted a claim, but at the same time set up a counter claim, the statement of the latter was made evidence, as well of the truth as the existence of such counter claim. In the present case the plaintiff puts in the defendant's warrant, which recites an information on oath, as the foundation of it. And, consistently with the authorities mentioned, I conceive it to be impossible to hold otherwise than that the existence of such an information should therefore be taken to be true. Whether it should, however, be regarded as equally strong evidence

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On the other hand, I conceive that both questions (certainly the latter) were for the jury. In *Haynes v. Hayton* (38), no doubt, Mr. Justice *Park* directed a nonsuit. It appears to me, however, that such a direction can only be regarded in a case of that kind, as equivalent to the expression of an opinion, that the jury would or ought to find for the defendant; and so, that the Judge put the plaintiff to his election, whether he would risk that verdict. It does not strike me, as being (in any other point of view) an appropriate case for a nonsuit. The ordinary cases are, where the plaintiff has failed, on some point material to his case, to give any evidence whatever, or where, assuming the whole of his case to be proved, but where the facts do not appear on the record, he is in the opinion of the Judge, not entitled to recover. Another case is, certainly, where some matter has clearly been established, for the defendant, in the course of the plaintiff's case, which forms a conclusive answer to the action. In all those instances, the jury (except by taking on themselves to declare the law) have plainly nothing to determine. But I know no rule of law, by which a jury is conclusively bound to believe a man's own assertion. The cases cited show, that they may believe it if they choose, where the plaintiff's own act, as here, has made it evidence. Possibly, in a case of this kind, they ought to believe it. But still, as it appears to me, the question is for them, not the Judge.

Had the jury returned their verdict in this case, after a direction to consider the evidence, I should not have felt disposed to disturb it. I by no means say that a verdict for the defendant, fairly given upon the evidence, would have been wrong. I certainly should not have thought it wrong, had the Judge advised the jury, in exercise of their province,

to give such a verdict. On the same ground I should have thought His Honor right, had he expressed his opinion what the verdict would be, or what it ought to be, when he was asked for the nonsuit. But the direction of a nonsuit on the explicit ground that the justification was proved, (whether with or without reference to the supposed *presumption*, which clearly did not exist, in favour of the recited facts) cannot in my humble judgment be supported. And, in like manner, I am of opinion that the direction to the jury, after the case had gone to them, by the plaintiff's refusal to be nonsuited, and after they had been addressed by the defendant's counsel, was mistaken. The case of *Haynes v. Hayton* (38), it may be observed, as to the question of nonsuit, is distinguishable from this, because there, as in *Goss v. Quinton* (39), the medium of proof was, not (as here) an act done, but an admission made. Now, as to this, the rule has always been, that the whole of an admission must be taken together, although, even then, it is held that the same credit need not necessarily be given to every part. (See the cases cited in *Phillips*, and in *Starkie on Evidence*, titles, Admissions and Confessions.) But the signing of the warrant, here, was no admission. It was an act, complete in itself. The declaration with which it was accompanied, no doubt became evidence with it. But it was still nothing more than evidence, and therefore should have been submitted to the Jury. And, as it was not so submitted, I arrive (though reluctantly) at the conclusion, that there ought to be a new trial. A great principle being involved, I think it can be no answer to say, that, practically, no injury may have been done. There was here a question of fact for decision. Not only, however, was that fact not left to the Jury, but they were told (apparently as a matter of law) that a justification was established, and were directed to find for the defendant, with an intimation that, if they did otherwise, they would exceed their province.

DICKINSON, J. I am of opinion that there ought to be no New Trial of this case.

According to the Judge's report, he in his direction to the Jury made remarks upon the evidence, in which he distinctly alluded to the fact that the defendant had not produced the information to the Jury. His Honor, in fact, laid the case before the Jury, with his opinion, in strong terms, that they were bound to deliver their verdict for the defendant. Unless it can be clearly shown that His Honor's opinion was wrong, I think we shall not be warranted in disturbing the verdict. *Davidson v. Stanley* (40).

(39) 3 M. & Gr. 825. (40) 2 M. & Gr. 721.

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I think that a Judge's direction of a nonsuit is in *all* cases, merely the intimation of his opinion that the Jury ought upon the evidence to find their verdict for the defendant. Such direction ordinarily arises, upon the plaintiff failing to prove some assertion of his own, which the defendant has traversed. *Lumby v Allday* (41). In such a case the Judge virtually says, "If the case rests upon the plaintiff's evidence, and the defendant adduce no testimony in answer to it, and the jury believe all the plaintiff's witnesses, they ought nevertheless in my opinion to deliver their verdict for the defendant." The present differs from the ordinary case in this, that the plaintiff *has* given evidence in support of his own case, and not only of that, but also of that of the defendant.

According to *Haynes v. Hayton* (42) the Judge was upon that evidence, as I conceive, authorised to direct a nonsuit, and thereby to express his opinion, that the verdict ought upon the plaintiff's own showing, to be delivered for the defendant.

Consistently with that opinion, the Judge could not, according to my apprehension, have directed the Jury otherwise than he instructed them; inasmuch as the direction for the nonsuit could only have arisen on the intendment, that the Jury had considered and agreed among themselves and were about to deliver their verdict; *Murphy v. Donlan* (43), *Devos v. Purday* (44), unless the circumstance of the defendant's counsel addressing the Jury, and not giving the information in evidence, can be considered as affecting the position of the parties.

As to the latter fact, it may be remarked—1st, that there was no request to the Judge to make any mention of that omission, 2nd, that the Judge specifically alluded to the circumstance, and the Jury as I am informed deliberated about their verdict, so that they must have had the omission under their consideration. But whether their attention was directed to it, or whether they were induced particularly to consider it, are questions, I think, of no moment; because I am of opinion that the jury would not have been justified, by reason of such omission, to have drawn any inference unfavourable to the defendant. For the non-production by him of the information could, at the utmost, only excite a suspicion, that it would falsify the recital in the warrant. But the Jury would have been, I think, no more entitled to entertain that, than the suspicion that *the Plaintiff* had neglected to produce it, under the apprehension that it would substantiate the defence. They might as well have suspected, that the defendant's reason for keeping it back

(41) 1 C. & J. 301. (42) 6 L. J., K. B. 231. (43) 5 B. & C. 179.
(44) 3 A. & E. 166.

was, that as the Judge had (on direction of the nonsuit) as I think, correctly intimated, that the plaintiff had done for him all he required for his defence, he was not called on to afford the plaintiff the advantage of his learned counsel's reply, by adducing additional evidence.

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It is, therefore, not clear to me, that any suspicion unfavourable to the defendant could, under the circumstances of the case, have been established (to the exclusion of other suspicions) in the minds of the Jury. But if so, such suspicion (according to the unanimous opinion of all the Judges of England, as expressed by Lord *Tenterden* in the *Queen's case*, 2, Brod. and Bingh. 308) is not a legitimate ground for the verdict of a Jury, and, therefore, if the suspicion existed, the Jury ought not to have been influenced by it.

As, therefore, after much deliberation with my learned colleagues, and several fluctuations of opinion on my own part, I am unable to satisfy myself that there was anything in the non-production by the defendant (after his counsel's speech) of the information, which made it incorrect in the Judge to direct the Jury to give the same verdict for the defendant, which (as I understand the case of *Haynes v. Hayton*) he had previously with strict propriety intimated they ought to deliver, I think (upon the authority of *Stanley v. Davidson*) (40) that we ought not to send this case to a new trial.

I am inclined to concur with His Honor the Chief Justice on all the other points to which he has adverted in the judgment just delivered by him, but desire not to be bound with respect to them, as they do not appear to me necessary to be now decided.

MANNING, J. In my opinion there ought to be no new trial. The questions are, substantially, whether the evidence given by the plaintiff's witnesses disclosed such a case as ought to have been left freely to the Jury, and whether, assuming such to have been the more strictly regular course, the verdict actually returned ought under the circumstances of the case, to be disturbed. Upon the first point, I incline to retain the view which, not without some hesitation, was expressed at the trial; upon the second, my opinion is clearly against the motion.

The case involves several principles of so much importance, that I think it right to state the grounds of my opinion at some length.

If the decision in favour of a nonsuit was right, it appears to me to follow that the direction to the Jury (if the case properly went to them at all) was correct also. The ground upon which a plaintiff is nonsuited

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at the trial, or by the full Court upon a point reserved, is, that in the opinion of the Judge or Court, the case presented by the plaintiff in his evidence is such that the Judge ought to direct, and the Jury thereupon to find, a verdict for the defendant; and it may either arise from a failure in proof of some fact necessary to be affirmatively established by the plaintiff or from his own evidence having negatived, *prima facie* or conclusively, his right of action either generally or under the particular form of pleading adopted. In *Dewar v. Purday* (45), it was said by *Campbell, A. G., arguendo*, "A nonsuit may take place upon the proof given by the plaintiff. It is then supposed that the Judge, upon the evidence as it stands, would *direct a verdict for the defendant*, and that they would find according to that direction, were it not that the plaintiff upon being called upon to hear the verdict absents himself. Both the nonsuit and direction would alike rest upon the ground that the case disclosed is not such as can support any part of the claim which the plaintiff has set up, and that consequently he ought to fail in his action. Therefore, where the state of facts remains the same, the direction of a verdict for the defendant, upon the plaintiff's refusal to be nonsuited, is but another, and the only mode of giving to the defendant the same right. It will be found in the reported cases, generally, that the Judge nonsuits *authoritatively*, which could hardly be reconciled with the plaintiff's common law right to have the case submitted to a Jury, except upon the ground that if he refuse to waive that right, the Judge may and would put him in a worse position by directing a verdict to be returned against him, and that the duty of the Jury would be to act upon that direction. Thus in *Dicas v. Lord Brougham* (46), it is reported that Lord *Lyndhurst, C.B.*, said, "The plaintiff must be called," and that "on *Platt's* (plaintiff's counsel) refusing to be nonsuited, his lordship told the Jury that the defendant was entitled to a verdict, which was taken and a bill of exceptions tendered." The present case was one in which it appeared to me in a peculiar manner proper to direct the verdict. The motion for a nonsuit had been fully argued on both sides, and the decision against the plaintiff had been deliberately and finally pronounced (after a recess of which I announced that I would avail myself for considering whether the case should or should not go to the Jury), before any intimation whatever was given by the plaintiff's counsel that he would not submit to a nonsuit. To have left the whole case freely to the Jury under such circumstances, would have been a plain inconsistency,—it would have been to sanction an appeal to the Jury against the decision which was properly

the subject of review by the Full Court only. I am indeed much disposed to think that the case ought not to have gone to the Jury at all, and that if the defendant's counsel had pressed me to do so, the right course would have been to record a nonsuit, and discharge the Jury. The power to nonsuit certainly arises out of the *assent* of both parties to the waiver of their common law right; but this assent may be either expressed or implied, and in practice it almost always arises from implication. That of the defendant is plainly involved in the motion (which he alone can make); whilst that of the plaintiff is ordinarily inferred from his not expressly refusing to submit to the opinion of the Court, when the nonsuit is proposed. Thus where at *nisi prius*, the defendant asks for a nonsuit and the Judge refuses to stop the case, but reserves the point, the Full Court may, upon motion, enter a nonsuit,—because it is assumed that the plaintiff silently acquiesced in referring the case to its opinion, and to waive the benefit of any verdict he may obtain, if the Court should think him not entitled to hold it. For this, the case of *Dewar v. Purday* (47), is a clear authority; and upon the same principle it seems to me that the fact of plaintiff's arguing the motion at the trial and ostensibly submitting the matter to the decision of the Judge until after that decision has been pronounced against him, raises an implication of the requisite consent. In the one case the plaintiff consents to abide by the opinion of the full Court, on condition that the case shall be immediately submitted to the Jury, so that if he obtain a verdict he may proceed to judgment and execution upon obtaining a favourable decision on the motion for a nonsuit. In the other, he consents to the nonsuit at once, rather than run the risk of a verdict which would finally bar his claim, subject to a motion to set aside the nonsuit, which if successful would give him an opportunity of presenting an amended case to a new Jury. The observations of the Court in *Dewar v. Purday*, and especially of Lord *Denman* (as reported in 4 N. and M., 636), would seem to apply with equal force to this case, and it is not easy to discover what better reason there can be for permitting the plaintiff to withdraw his implied assent after the decision at *nisi prius*, than after a reservation to and judgment by the Full Court. It has become not unfrequent in this Court, and the case of *Dicas v. Lord Brougham* is certainly an instance in which it was done, but there (as in this case) the course was not objected to by the defendant's counsel, who may have preferred the strong direction to the Jury, of which they were certain, to a nonsuit which would leave their client exposed to a new action. In this case, the plaintiff having

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1848. insisted on the case being submitted to the Jury, after a nonsuit had been directed under his implied assent, it seems not too much to expect that in his objections to the Judge's charge, he should be confined to such ground as would be open to him if he were now here to impeach the nonsuit, and if that be so, the direction may be sustained, even though there should be exceptions to the rule that a ground of nonsuit is also a ground for absolutely directing a verdict for the defendant.

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II. Then was this a case for a nonsuit? The plaintiff charges the defendant, according to the usual form of pleading in such cases, with having imprisoned him "without any reasonable or probable cause"; and it is clear that whether the allegation of want of cause is or is not necessary in *pleading*, the action can, in point of fact, only be sustained on the ground that the defendant has caused the plaintiff to be arrested wrongfully, for it is a remedy given for an *injury done by actual misfeasance*. It is also clear that an arrest is not of itself necessarily a wrongful act, because it may be lawful and even meritorious, according to the attendant circumstances; but any infringement of the liberty of another is ordinarily taken, in evidence, to be *prima facie* a trespass; and thence it follows that the grounds which justify an arrest in any particular case must be shown in rebuttal of the presumption. Consequently, if a plaintiff can prove that the defendant imprisoned him without at the same time rebutting the presumption of wrongfulness by equivalent proof, he may, in launching his case, content himself with such proof, and so cast upon the defendant the burthen of proving his justification; but if he cannot do so, then it becomes necessary to disclose at once (as he usually does, and perhaps always ought,) the real gravamen of his charge. In this case the plaintiff did not connect Mr. Barton with the arrest, except by putting in the warrant, and thus showing that he acted ostensibly in his magisterial capacity, and making the recital of sufficient justificatory facts evidence against himself; he did not show the fact of arrest, except by witnesses who proved that the defendant was a magistrate,—that a written complaint on oath had in fact been made,—that the warrant issued *upon that complaint* (which fact was distinctly elicited by the plaintiff for the purpose of excluding other evidence of sufficient cause),—and that the goods alleged to have been stolen were found, according to the tenor of the warrant before the arrest. Such then was the case upon which the question arose; and it appears to me impossible to say that it makes out a case of *misfeasance*. On the contrary the whole complexion of the case is that of *duty performed*; although it is nevertheless possible that by production of the information the defendant might have been shown to be a wrong-

doer. The only question is whether the conclusion, however palpable, should not have been drawn by the Jury instead of the Judge. The decision of *Haynes v. Hayton* (48), recently recognised by that of *Bessey v. Wyndham* (49), is a strong authority to show that the recitals in the warrant would of themselves have been sufficient to authorise the non-suit. The case is certainly open to the distinction pointed out by his Honor the *Chief Justice*, namely, that there the whole evidence rested upon *admission*, whereas here the recitals are allegations incorporated with an *act done*, i.e., the order to arrest, but the admission there was as distinct to prove the receipt of money as the order here was to connect the defendant with the arrest, and it would be as much open to the Jury to discredit the accompanying allegations in the latter case as in the former. And it will be seen that in *Bessey v. Wyndham*, the warrant was an *act done*. On the other hand, there are differences between *Haynes v. Hayton* and this case, which make the present an *à fortiori* case. There the letter of the under-sheriff was not a judicial or even, strictly speaking, an official act, nor were the facts which made for the defendant stated by him in performance of any positive legal duty; whereas, here the warrant was a judicial act (2 *Hales*, P. C. 150), and the recitals are inserted in compliance with the requirements of law. As a judicial act (though not of that higher judicial character which would make its recitals conclusive in all respects, and protect the officer issuing it from all liability to a private action), there may well be attributed to it, a greater credit than to the Under-Sheriff's letter, and as a compliance (ostensibly at least) with the requirements of law the recitals would ordinarily be assumed to be correct. *Goss v. Quinton* (50). Moreover in this case there are the additional facts, independently of the recitals, which have been already noticed. A great many cases have been examined by us, but with the exception of *Stevens v. Clarke*, which has received a sufficient answer from the *Chief Justice*, none appears to me to impair the authority of *Haynes v. Hayton*. In *Bessey v. Wyndham*, which was an action against the Sheriff for the sale of goods claimed by the plaintiff under a fraudulent assignment from one *Brinded*, the only evidence to fix the defendant was the warrant reciting a *fi. fa.* at the suit of a judgment creditor of *Brinded*. The material question left to the jury having been as to the *bona fides* of the assignment, and a verdict being found for the defendant, a new trial was moved for on the ground that the assignment was good against a *stranger*, and that the Sheriff was such, there having been no sufficient proof of the writ. It was answered

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(48) 6 L.J., K.B. 231.

(49) 6 Q.B. 172.

(50) 3 M. & Gr. 830.

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that the recital was such proof ; to which it was replied that it should have been *left to the jury* upon such evidence, to say whether there had been a writ or not. *Lord Denman*, in delivering the judgment of the Court of King's Bench, said, "The only mode of fixing the Sheriff was the production of his warrant, which recited a writ. Here, therefore, the proof of seizure involved *some* evidence of its having been made by the authority of the law, and such evidence as *leaves no possibility of doubt as to its truth*. It was urged that the evidence ought to have been submitted to the jury, who ought to have exercised their judgment on its sufficiency ; but we do not think the principle applicable here, where the specific evidence was neither objected to *nor open to any objection*, but overlooked by both parties, and *when observed is, in truth, conclusive on the point*." The new trial was therefore refused. Many of the other cases go far to show that the warrant is conclusive *in law* of facts recited, so as to shut out all proof of contradiction, and not merely conclusive *in fact*, whilst the recitals stand uncontradicted (which is probably the view taken in *Haynes v. Hayton*, and *Bessey v. Wyndham*) : but I am satisfied that it is not so, and that, therefore, it was open to the plaintiff to negative such of the statements as were necessary to give jurisdiction. That the recitals were some evidence we all agree, and that a jury would not be bound to adopt them as true if they had any ground for the rejection, may be admitted ; but I am at loss to discover upon what principle the Court or jury could discredit the allegations *gratuitously*, when once made evidence. If there were any intrinsic improbability in them, any reason for supposing the recitals fabricated with a view to give apparent legality to the warrant, or if there had been contrary proof, so as to impose upon the jury the duty of balancing the evidence, then the rejection might be legitimate ; but the lightest weight must conclusively decide the balance, if there be nothing in the opposite scale. Here no such ground exists, but, on the contrary, the other evidence corroborates the recitals, and goes to the very verge of proving the same facts *aliunde*. The only circumstance upon which an argument for discrediting the evidence could be based was the non-production of the information by the defendant, a fact which I think fully counterpoised by the non-production on the other side. To allow such a circumstance to affect the consideration of the question at all, would be to put a groundless surmise in the place of evidence, and to open the door to the operation, upon the minds of the jury, of prejudice or of other grounds of determination not suggested by the proof in Court. Upon the whole I am therefore of opinion that, upon the evidence as it stood, no jury ought to have found a verdict

for the plaintiff; and thence it seems not an unreasonable deduction that the case was a proper one to be withdrawn from their consideration altogether (as in *Haynes v. Hayton*), so that the plaintiff should be deprived of the *chance* of obtaining a verdict to which he had no right. But upon this latter point my opinion is not so clear as to remove all doubt whether the more strictly constitutional, and the safer, course would not be to submit the case to the Jury with strong observations for the defendant, and to bring their verdict under review if they should decide against the evidence.

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III. Assuming that the direction was erroneous, I do not think it necessarily follows that a new trial should be granted. *Bessy v Wyndham* is an authority on this point. If we can clearly see that the proper conclusion of fact has been arrived at, it would neither be just nor reasonable to visit upon the defendant the error of the Judge, nor right towards the Jury to upset a verdict which may have been as independent as it was correct. In this case the facts were put before the Jury in explanation of the direction, and that direction was accompanied by a statement that they had the power, though not the right, except such right as the power gave them, to find contrary to the direction. The error of the charge, if any, was only in attempting to control the exercise of that power by a tone of authority instead of guiding it by advice; and, as the jury retired for a short time before delivering their verdict, it may even be that they actually exercised an independent judgment.

IV. I am clearly of opinion that the verdict was the only proper conclusion of fact which the evidence warranted, and ought not to be disturbed. The effect of that evidence, taking the whole together, was to prevent any *prima facie* case of trespass arising. Every fact that bore upon the question was proved, except the *contents* of the information; and the defendant is made to appear in the character of a magistrate discharging a public duty in a regular manner, and not one inflicting a wrong upon the plaintiff by an abuse of his power. The production of the information might certainly have established the plaintiff's cause of action on the one hand, or put the defendant's jurisdiction beyond dispute on the other; but the latter stands on the defensive, whilst the former is bound to make good his attack; and as it is idle to say (in the absence of any explanatory evidence that the information was not as accessible to the plaintiff as to the defendant) any inference of a fact to be drawn from its non-production might not unreasonably be unfavourable to the latter rather than to the former. For my own part, however,

1848. I see no reason to draw any inference of the sort either way ; and,
SMITH therefore, I look to the evidence only as it stands, and upon that evi-
r. dence I cannot think that an unprejudiced jury would have found for
BARTON. the plaintiff if the case had been freely submitted to them, or that such
Manning J. a verdict would have been upheld by the Court if questioned upon a
motion for a new trial.

I beg to be understood as not giving any opinion upon the question whether the information should disclose a clear case of larceny (or other crime), or whether it is enough that the allegations make out a reasonable case for enquiry as to the fact of larceny (or other crime) as well as of the guilt of the party accused. In my view, the point does not arise ; for unquestionably the recitals are sufficient if taken to be true.

New trial refused.

LESTER v. GIRARD. (1)

1848.

Evidence—Trespass to “station”—Acts of former occupier.

July 3.

Stephen C.J.
Dickinson J.
and
Manning J.

In an action of trespass to a sheep station, in which the defendant has pleaded “not possessed,” the plaintiff is entitled to prove possession of the part of the station trespassed on, by showing that the former occupier, from whom he purchased, occupied the ground in question.

THE judgment of the Court was delivered by—

THE CHIEF JUSTICE. This was an action of trespass, to land in the district of New England (beyond the boundaries prescribed for the disposal of land by the Crown), tried before his Honor Mr. Justice *Dickinson*. The defendant had pleaded the usual plea of Not Possessed; and the plaintiff, in order to show his possession, constructively, of the tract or place trespassed on, proved first his actual possession of a squatting station or sheep run called Glencollen, and then offered evidence to show that the former occupier (from whom he purchased the station, and on whose departure he entered into possession of it), occupied in fact the ground in question, as a part of that run or station. The evidence was objected to; but his Honor, on the authority of a ruling of mine, in the case of *Hickey v. Russell*, at the late Maitland Circuit Court, received it. And now, a verdict having been found for the plaintiff, the Court was moved in the last term, on behalf of the defendant, for a new trial.

Mr. *Broadhurst* and Mr. *Fisher* submitted, that, as the plaintiff's case rested exclusively on his own occupation, he could never advance it by showing what was the occupation of another; and that, consequently, the evidence was inadmissible. They maintained, that actual possession was necessary, inasmuch as the property of all the lands was in the Crown, which must therefore be taken to be in possession, in every case where actual occupation was not shown to be, exclusively, in a subject. On the contrary, the *Solicitor General* and Mr. *Darvall* contended that, whether more or less material, as in fact aiding the proof of possession in the plaintiff, the evidence was at all events *admissible*. They did not pretend that the purchase of a former occupier's right to a station, merely, without actual possession taken of that station, would

(1) *The Sydney Morning Herald*, April 14, July 7, 1848.

1848. enable the purchaser to maintain trespass. But, they said that here the plaintiff *had* taken possession—that is, of the run or station generally ;—that actual possession of every part in such a case was unnecessary ;—that he occupied constructively the whole, by occupation of the greater part ;—and that it thus became a mere question, what *was* the whole ? In other words, what was the actual extent of the station which he so occupied ; to show which, the possession of and acts of ownership by former occupiers of the same station, furnished, at all events, *some* evidence.

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The following cases were cited *Stanley v. White* (2) ; *Harper v. Charlesworth* (3) ; *Browne v. Dawson* (4) ; *the King v. the Corporation of London* (5) (cited for a dictum of Lord Kenyon) ; and *Jones v. Williams* (6).

We have examined those cases and some others, and we are of opinion that the evidence objected to was rightly received. It is clear that, in order to show possession of part of a property (of part of a field, for instance), the fact of actual occupation of every part of that property is not necessary. Whether the property be a single and small field, or a very large and extensive one, and whether it consists of one field or many fields, the principle must, we apprehend, be the same. If, then, we consider the case of a large common, or other wide tract of country, the whole or the greater part waste and unenclosed (as in this colony, beyond the boundaries, will be met with everywhere for many hundred miles in extent), the principle still seems to us to be applicable. But, in such a state of things, how is possession of any given spot to be shown, where the present claimant has not been bodily on, by himself or his cattle ? It can only be by showing that it has ordinary (that is, under former occupiers), been dealt with as part of a given property ; of which, or of the residue of which, he has possession. Now, the fact that a former occupier of Glencollen also occupied that spot, cannot of itself show that it formed part of Glencollen. But, the unity of possession in such a case *tends* to show it ; and, if so, the evidence was admissible.

We must apply evidence to circumstances, as we find them. Here is a vast extent of territory, ungranted, undefined by artificial means, unmeasured, with only here and there a natural boundary, not always marking that of the properties which lie nearest to it. And if there *were* such boundaries, or a *name* have been assigned by the neighbours to any occupied station, the difficulty of establishing *possession*, in the case supposed, would not be less. Yet the whole of this territory, thus

(2) 14 East 332. (3) 4 B. & C. 585. (4) 12 A. & E. 624. (5) 4 T. R. 26.
(6) 2 M. & W. 326.

described, is, in fact, occupied by very many persons, who have each their separate runs or tracts permissively from the Crown; and who (subject, of course, to the power of the Crown, at any time, where no lease or grant has been issued, to interpose,) transfer their possession to others at their pleasure. Is the new comer, then, at the mercy of all persons who may chose to contest the right with him, unless he can immediately reduce his wide domain into manual occupation, or may he not enter into a part in the name of the whole, showing the extent, by the occupation of those who preceded him? We think that he has these rights; and that such evidence is, under the circumstances, the only kind which the case, in its nature, admits of. No title but that of *possession*, (which is a title, against one who has no better,) here exists between the parties. But the question is one which can be solved by no other test.

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In cases of disputed *ownership*, however, evidence not more directly bearing on the issue, than was admitted here, has been held to be properly receivable; as in *Stanley v. White* (2) and *Jones v. Williams* (7), cited at the bar, so, in *Doe v. Kemp* (8), on which the last-mentioned case mainly proceeded. In all those cases, it may be observed, the difference between the admissibility of evidence and its effect or value when admitted, is distinctly recognised. All which is necessary to make a fact admissible is that it shall reasonably lead or tend to some inference bearing on the issue. On that principle alone, we should think the evidence in this case rightly received, even if we attached much less weight to it than we conceive it entitled to. "Acts of ownership," says Lord Denman, in *Doe v. Kemp*, in the Exch. Chamber,) "in one part of the same field are evidence of title to the whole; and the same may be said of similar acts, on part of one large waste or common." And, to show of what the waste consisted, or how far it extended, in that case, the Court held that the local situation, and unity of character, of divers pieces of waste land in the neighbourhood, on portions of which there had been acts of ownership exercised, might be looked at. Equally indirect evidence was received in other cases; not only evidence applying to the spot in dispute, but evidence of what was done in other places, similarly situated. Lord C. J. Tindal says, in *Doe v. Kemp*, "In questions of right of common, evidence of feeding on any part of the common may be shown. But, *enclosure* is a much stronger act of ownership than feeding. Why, then, should not evidence be admitted of acts of enclosure in other open places of the same manor?" And in

(7) 2 M. & W. 326.

(8) 7 Bing. 332, and 2 Bing. N. C. 104.

1848. *Jones v. Williams*, Baron *Parke* says—"It is impossible, in the nature of things, to confine the evidence to the very precise spot on which the alleged trespass may have been committed. Evidence may be given of acts done on other parts, provided there is such a common character of locality between those parts and the spot in question as would raise a reasonable inference in the minds of the jury that the place in dispute belonged to the plaintiff, if the other parts did."

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In like manner, we conceive that here the fact of the plaintiff having entered into possession, not of one or more closes, but of a certain large continuous tract, as part of a station called *Glencollen*, under a purchase from a former occupier, and the fact of that occupier having been in possession of the place trespassed on, as a part of the same station, might raise a reasonable inference that, as the plaintiff was in possession of *Glencollen*, he was constructively in possession of that place also, as forming a part of *Glencollen*.

In delivering this as the judgment of the Court, I am to add for Mr. Justice *Dickinson* that, although offering no exception to any particular expression in it, His Honor does not see how the land was occupied "*as part of Glencollen*," the evidence only showing, as he conceives, that the locus *was* occupied, and that there was a tract or station called *Glencollen* similarly occupied. But His Honor thinks that possession of the locus by the plaintiff's predecessor, (although, under ordinary circumstances, indicating an ownership in fee) tended more, considering the relative situation of the places, to show that it was part of the *Glencollen* station, which he also occupied; and so, as the plaintiff succeeded to the possession of *Glencollen*, that the fact was admissible, to the same point, in this action. Mr. Justice *Manning* entirely concurs in the judgment, but His Honor is not to be understood as having expressed any opinion respecting the effect of a Crown license on a party's possession, a question which he conceives may admit of much discussion.

New trial refused.

REGINA v. ABBOTT. (1)

*Criminal information—Abduction—9 Geo IV, c. 31, s. 20—"Taking" or
"decoying."*

1848.

July 12.

A case being such as, under the circumstances, to call for the issue of a criminal information, the particular object or motive of the prosecutor is immaterial.

Stephen C.J.
Dickinson J.
and
Manning J.

Inducing or persuading a girl to leave her parents, or remain absent from them, without any actual taking by the accused, personally or by an agent, constitutes the offence of abduction, within sec. 20, of 9 Geo. IV, c. 31.

Regina v. Meadows (2), not followed.

IN this matter a charge of abduction had been made before Justices against the defendant, at the instance of one *Sarah Edgar*, the mother of *Mary Ann Challenger*, the girl abducted, who was then under the age of 16 years, pursuant to the statute 9 Geo. IV, c. 31, s. 20. It appeared that the mother of the girl had intermarried with *Joseph Edgar*, her present husband, after the death of her late husband, who died intestate, leaving the girl in question his heiress. The mother, after her second marriage, retained possession of the property of her late husband, and lived at Lane Cove, where also resided *Mary Ann Challenger*, under the charge of her mother. Being sent on an errand by her mother on the 8th of April, she was married to the defendant on the evening of the same day and remained at his house. Her parents on receiving information demanded possession of her, but were refused.

The charge having been dismissed, a rule *nisi* for a criminal information was obtained.

Lowe, for the prosecutor, *Mrs. Edgar*, now moved to make the rule absolute.

The *Solicitor-General* showed cause.

Lowe, in reply.

Cur. adv. vult.

The reserved judgment of the Court was delivered by—

THE CHIEF JUSTICE. We have considered this case, and we are of opinion, that the leave which is asked for, to file a criminal information against the defendant, must be given.

In the case of the *Queen v. Maginnes* (3), on a similar motion, decided in this Court in the month of October, 1846, the principles on

(1) *The Sydney Morning Herald*, July 11, 12, and 13, 1848.

(2) 1 C. & K., 400. (3) ante. p. 351.

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which leave should be granted to file a criminal information, under the statute, were fully stated, and on the principles there laid down, the questions for our decisions are two only :—first, whether the particular case is one, under all the circumstances, to call for the exercise of this peculiar jurisdiction ; and secondly, whether such evidence has been adduced, as on the whole (having regard to that given on either side) establishes a case for holding the accused to bail. On the first question we have no difficulty, because the prosecutor here has done his utmost, apparently, to prosecute in the ordinary mode, without success ; and we think his particular object, or motive (real or supposed), in such a case, immaterial to the inquiry. On the second, we are of opinion that a case for holding to bail *has* been established.

The case of the *Queen v. Meadows* (4) has no doubt afforded countenance to the opinion, that there must be an actual taking of the girl by the accused, personally, or by an agent, and that merely inducing or persuading her to leave her parents, or remain absent from them, would not be an offence within the enactment. We are of opinion, however, that either of such last-mentioned acts will constitute the offence of abduction. The high authority of the eminent Judge, by whom the case just cited was decided, might have prevented our arriving at this conclusion ; but for the terms, scarcely amounting to a positive and deliberately formed opinion, in which the learned Judge expresses himself, and for the case of the *Queen v. Robins* (5). The succeeding section in Lord Lansdowne's Act (the offence of taking away a girl under sixteen being provided for by s. 20) contains also the words *take away*, but with the words *decoy or entice* superadded, and from this circumstance, the former words in s. 20 were supposed not to have included a decoying or enticing only. But, on a comparison of the two sections, it will be seen that the 21st is so very differently worded throughout as to render any argument drawn from it to affect the other, a very inconclusive and unsatisfactory one. Under the former statute, the fact that the girl was induced to elope, by no other means than the ordinary blandishments of a lover, was holden to be no defence. We think, therefore, that (as in the direction of Mr. Justice Dickinson to the jury, in the case of the two *Cadby's* in November last), either persuading or inducing a girl under sixteen, whatever the means used, to quit her guardian or parent, or where she has previously quitted him, but is under the obligation to return—persuading or inducing her to remain absent will amount to an abduction within the said 20th section. It is indeed clear, that, as the use neither of *force* nor *fraud* is requisite

(4) 1 C. & K., 400. (5) 1 C. & K., 456.

to constitute the crime, and as the *consent* (or even the *procurement*) of the girl herself can form no answer to it, she may as effectually be taken away by persuasion as by any other means. And what difference is there, substantially, between the case of a girl assisted from her father's gate or window (where the idea of *taking* is at once suggested), and the case of his meeting her, by previous assignation, a few yards or a few miles from it, and *there* taking or detaining her.

In the present case, no doubt, the party charged has sworn, that he neither took the girl, nor caused her to be taken. But the value of this denial depends on a question of construction. If he neither persuaded nor induced her to come, he might easily have said so. He could, at least, have afforded some explanation of the circumstances which lead to the suspicion that he did so induce or persuade her. The girl (who, it appears, is entitled to some property, of about a hundred and forty pounds a year) quits her parents' house at Lane Cove, some miles distant from Sydney, in the evening, and soon afterwards, certainly on the same evening, she falls in with the defendant; by some mysterious agency a Baptist minister is in readiness (where we are not told), by whom he is instantly married to her; and, within an hour or two, or a very few hours next following, she is at the house of this husband, or his father, in the vicinity of her own parents' residence, disclaiming their authority, by virtue of the ceremony. It is sworn, moreover, that the defendant was then taxed with the abduction, and that he did not deny the charge. Now, it may be that he found her nothing loath; that she has (as he intimates) quitted a sordid mother and stepfather, to become a member of a well-conducted family, equal to or above her own. It may be, that he intends to settle his wife's property on her; and that we should never have heard of this prosecution had he consented to share that property with the parents, who desired to retain her solely for its sake. But, however all this may be, the question which we have to decide remains the same. The law, for most wise and beneficent purposes, has subjected clandestine and unsanctioned proceedings of this kind to prosecution and punishment; and the peace and happiness of families, considering the ease with which girls at that age may be made a prey to villainy, or the designs of mere adventurers for gain, are deeply interested in the provision. Is there a *prima facie* case against this defendant, within the intent and meaning of the enactment against abduction, fit and proper to be enquired into by a jury? We think, for the reasons stated, that there is such a case, and, therefore, we send it to be so enquired into accordingly.

Rule absolute.

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July 14.

RYAN v. HOWELL. (1)

Stephen C.J. Distress for rent—2 Will. and Mary, sess. I, c. 5—Surplus after sale—Sheriff—Demand before right of action.
Dickinson J.
and
Manning J.

Section 2, 2 Will. and Mary, sess. I, c. 5, is not in force in the Colony, not because its provisions are in their nature inapplicable, but because machinery for its application is wanting.

But the statute may be applicable to the Colony so far as to legalise the sale of goods distrained for rent, in the absence of a valuation by an appraiser sworn by one of the officers named in the statute, notwithstanding that it is inoperative as regards the disposal of the surplus, which by section 2 is to be handed to "the Sheriff or Under-Sheriff of the county, or constable of the hundred, parish, or place, when such distress shall be taken."

The Sheriff and Under-Sheriff of the Colony do not, within the meaning or for the purposes of this Act, occupy the place of such officers.

The distrainer is not bound to hand the surplus immediately to the owner of the goods. An actual demand is a necessary preliminary to a right of action in the owner, and the distrainer is entitled to a reasonable time after demand for investigating the claim of ownership.

THE declaration in this case stated that the defendant seized and distrained certain goods and chattels of the plaintiff, in the name of a distress for rent, and that he afterwards caused them to be appraised and sold for the sum of £15, being a sum much larger than the rent due; and although the rent was afterwards satisfied, yet the defendant did not pay over the surplus, according to the statute in that case made and provided, either to the Sheriff or the Under-Sheriff of the Colony, or to the constable of the parish, for the use of the plaintiff, nor has the defendant paid the said surplus to the plaintiff. To this declaration the defendant demurred, on the ground that the provisions of the statute referred to were not in force in the Colony; that the appraisement alluded to could not have been made in the Colony, and that the Sheriff, &c., was not bound to receive the surplus, &c., and could not give a legal discharge.

Broadhurst, for the defendant, in support of the demurrer.

Darvall, for the plaintiff, *contra*.

Cur. adv. vult.

(1) *The Sydney Morning Herald*, July 17, Oct. 10, 1848. Cited in *Slapp v. Webb*, *post*, Oct., 1850.

Judgment was delivered by—

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MANNING, J. This was an action on the case. The last count of the declaration charged the defendant with not having left the "overplus" of a distress for rent, levied upon the goods of the plaintiff, in the hands of the Sheriff or Under-Sheriff of the Colony, or of the constable of the parish where the distress was taken, and after alleging a breach of duty on the part of the defendant, under the statute, in not so leaving the overplus, although a reasonable time for that purpose had elapsed, concluded thus: "And he, the said plaintiff, hath not yet received, or been in any way satisfied for such overplus as aforesaid, contrary to the form of the statute in such case made and provided."

The count was demurred to on the grounds that the provisions of the statute referred to (2 Will. and Mary, sess. I, cap. 5, sec. 2) are not in force in the Colony; that no appraisal and sale under the said statute could be legally made in the Colony; that leaving the overplus in the hands of the Sheriff of the Colony would be no discharge to the distrainer, and that the Sheriff would have no authority to receive such surplus, and would not be bound to receive it; and that the count does not allege that the defendant did not pay the surplus to the plaintiff himself.

The demurrer was argued before us on the 14th July by Mr. *Broadhurst* for the defendant, and Mr. *Darvall* for the plaintiff. In support of the demurrer, it was contended that the enactment referred to required the overplus of any distress for rent sold under that Act to be left "with the Sheriff or Under-Sheriff of the county, or the constable of the hundred, parish, or place, where such distress shall be taken," and that as there were no such officers here, the particular provision in the Act, with the breach of which the defendant was charged, was not applicable to the colony. *Attorney-General v. Stewart*, (2); *Wallace v. King*, (3); *Blatcher v. Kemp*, (4); *Rex v. Weir*, (5). For the plaintiff, it was contended that the provision was in force by reason that the Sheriff and Under-Sheriff of the Colony, are in the place of the like officers in an English county, and it was urged that if the Act was not in force as to the disposal of the overplus upon a distress sale, it was equally inoperative to legalize the sale itself. It was further contended that if the defendant was not bound to leave the surplus with the Sheriff or Under-Sheriff, he ought to have paid it to the plaintiff, and that his neglect to make such payments was sufficiently alleged in the count. *Lyon v. Tomkies*, (6).

(2) 2 Merivale 143.

(3) 1 H. Bla. 15.

(4) *Ibid.*, in notis.

(5) 1 B. & C. 288.

(6) 1 M. & W. 603.

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Our opinion is, that the count cannot be sustained in respect of the alleged breach of duty, in not leaving the overplus with the Sheriff, &c. It is not necessary to consider the question imported into the demurrer and argument, as to the legality of a *sale* of goods distrained for rent in the absence of a valuation by an appraiser, sworn by one of the officers named in the statute, but we desire distinctly to be understood as not inferentially intimating any opinion unfavourable to the existence of the right of sale. There may be grounds upon which the enactment may be applicable to the Colony to that extent, notwithstanding that it is inoperative as regards the disposal of the surplus. The object of the legislature in requiring the overplus to be left "with the Sheriff, Under-Sheriff, or constable of the parish, hundred, or place," appears to have been that it might be placed in the hands of a known local officer, who would at once be a safe and conveniently accessible stakeholder or depository between the distrainer and the owner of the goods; and it would seem that the constable of the parish, as being the more immediately local officer, is in England the usual person to swear the appraiser before sale, and to receive the surplus afterwards. *Avenell v. Croker* (7); *Wallace v. King* (8). Where such officers exist the provision is beneficial to both parties: to the distrainer, because he might not know to whom the surplus should be handed, inasmuch as the owners of the goods sold may be others than the tenant distrained upon, and may be numerous: to the owner or owners of the goods, because it imposes upon the distrainer the duty of immediately handing the overplus to a recognised officer, whose local knowledge, authority, and position, give the best guarantee for the proper settlement of the balance, and the due appropriation of the money. But if the enactment were held to be operative in this Colony, whilst (as was correctly admitted in the argument) there are no Sheriffs or Under-Sheriffs of local divisions such as English counties, nor any officer who can individually and specifically be recognised as "the" constable of particular parishes, hundreds, or places, it is obvious that what was intended to be beneficial would be converted into an intolerable inconvenience.

It is unnecessary to decide whether, if the constables only were wanting, the distrainer would be absolved from the obligation of complying with the enactment by leaving the overplus with the less available officers pointed out by it; for we are of opinion that the Sheriff and Under-Sheriff of the Colony do not within the meaning or for the purposes of this Act occupy the place of such officers in the comparatively

(7) M. & M. 174.

(8) 1 H. Bla. 15.

limited bailiwicks of England and Wales, with reference to which only the statute of Will. and Mary was actually passed. The Sheriff of the Colony differs from them in several particulars, of which the most important with reference to the present question is that the jurisdiction given to him by the Charter of Justice comprehends the entire territory, but that he is not required to execute process beyond limits to be fixed by the Court. It would be absurd and inconvenient that he should be required to swear all the appraisers on every distress, and to receive and see to the due appropriation of the surplus upon every distress sale throughout the length and breadth of this territory ; and it would be equally so that every appraiser should have to come to him to be sworn, every distrainer be required to transmit the overplus to him, and every owner of the goods sold have to apply to him for and establish to his satisfaction the claim to a surplus. Such considerations are not without weight with us in "adjudging and deciding as to the applicability" of this law, as by the 24th section of 9 Geo. IV, cap. 83, we are required to do. There is nothing, it is true, in the provision in question which is in its nature inapplicable to the colony as such or as an infant state ; for it would be competent to the Legislative and Executive authorities to divide the colony into counties with separate sheriffs, and into parishes, &c., with a recognised officer as constable of each. But as long as those authorities think the present arrangements preferable and retain them we cannot judicially apply an enactment for which the machinery is wanting, nor hold a party liable to an action for not performing an act which in the absence of the officers designated by the statute it is not in his power to perform.

The remaining questions are, whether on the assumption that the enactment which we have been discussing does not apply, the defendant too was bound to hand the surplus immediately to the plaintiff himself, and whether in that case the count does not disclose a sufficient cause of action by non-payment to the plaintiff. Upon these points we are also against the plaintiff. The count was palpably not framed with reference to any such cause of action, and the non-payment is not directly alleged, but only, if at all, by inference from the allegation that the plaintiff "has not yet received or been in any way satisfied for the surplus." Taking it, however, that the count could be sustained in respect of non-payment to the plaintiff, and that such non-payment is sufficiently shown, yet we think it defective for not stating a *demand* of the money. The defendant having regularly sold under a distress, and having in his hand an overplus upon such sale (which facts are not here questioned), the overplus was not "money had and received to the

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1848. plaintiff's use," and which he was bound at any particular moment to
RYAN pay over to the owner of the goods without demand. A reasonable
v. time would be required for ascertaining the balance ; but the statement
HOWELL. that a reasonable time had elapsed for leaving the overplus with the
Manning J. sheriff, &c., must be sufficient for that purpose. Then after the balance
is found; the true owner is to be ascertained by the distrainor, instead
of by the sheriff, &c. ; and we conceive it to be clear that as the goods
distrained upon do not necessarily belong to the tenant for whose rent
they were seized, it cannot be the duty of the distrainor to find out to
whom the surplus and every fraction of it is of right due, and forthwith
pay accordingly, without an actual demand by the party or parties
entitled. An actual demand we therefore hold to be a necessary pre-
liminary to the action, and as the case is altogether new, it may be well
to add, that as at present advised we consider that the distrainor should
have a reasonable time after demand for investigating the claim of
ownership.

Demurrer upheld.

DOE *dem.* BOWMAN *v.* M'KEON. (1)

1848.

Evidence—11 Vic., No. 38—*Certified copy of enrolment of grant.*

July 20.
Stephen C.J.
Dickinson J.
and
Manning J.

The Statute 11 Vic., No. 38, makes a certified copy of the enrolment of a grant primary evidence of the grant, without proof that the original grant cannot be produced. The enrolment of grants in the Registrar's book must be presumed to be correct (*per the Chief Justice, and Manning, J., Dickinson, J. dissentiente.*)

At the trial of this case at *Nisi Prius* before Mr. Justice Manning, a grant of the land in question was proved by the production of a copy of the enrolment of the same, certified by the Registrar-General, which evidence was objected to, and a verdict was found for the plaintiff.

Broadhurst, for the defendant, now moved for a new trial, contending that the evidence was wrongly received. The Act was loosely worded, but being in derogation of the common law, must be strictly construed. It should have been shown that the grant once existed, and that it was not producible from some cause or other.

Lowe, contra. Before the Act secondary evidence could have been given of the grant after proof of the facts now required by the other side, and if that were still held to be the case, the Act would be rendered nugatory. It was the Registrar's duty to make the entries, and they were kept as of record, so that a presumption arose in favour of their being correct.

His Honor the CHIEF JUSTICE, in delivering judgment said, he was of opinion that the evidence had been rightly received, and that there ought to be no new trial. The entry or copy of grants entered and enrolled in the Registrar's book must be held to be purporting to be such entries, &c., and that the document certified under his hand must also be held to be a copy of that entry or enrolment. Upon the production of this certified copy in evidence, the necessity of producing the original grant will be superseded under the Act. In construing the Act, it would be safer to give the words used their plain and natural effect; and it was giving that effect by holding the above opinion; therefore, as might be concluded, there was no necessity for laying the grounds as contended for the production of such certified copy.

(1) *The Sydney Morning Herald*, July 21, 1848.

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His Honor Mr. Justice DICKINSON dissented from the above, holding that this Act being in derogation of the common law and rules of evidence, it ought to receive a very strict interpretation. It was quite evident, looking at the language of the section in question, taken in conjunction with the preamble of the Act, that the evidence adduced here could only be admissible, where the original grant could not be adduced, and it lay upon the party resorting to it to lay such foundation. The enrolment too ought to show upon its face that it is an enrolment of the grant.

MANNING, J. concurred with the *Chief Justice*.

Application refused.

[IN EQUITY.]

SPENSER v. GRAY. (1)

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Sept. 22.

Manning P.J.

Crown grant—"Real justice and good conscience of the case"—5 Will. IV, No. 21—27 Eliz., c. 4—*Volunteer*—*Notice of trust*—*Inquiry for documents of title*—*Caveat emptor*.

Land in Sydney, occupied by M, under the promise of a grant from the Governor, was sold by him in 1819 to C, who in 1822 conveyed the same for valuable consideration to S, reciting his seizin or possession of the said land, *in trust* for the son of S, and in case of his death during his minority, remainder to S, and in the same instrument covenanted with S for good title, &c. In 1824 S sold to the defendant, who had ever since been in possession. The plaintiff, the *cestui que trust* under the conveyance to S, having brought a bill for a conveyance of the property, for which a grant had issued to the defendant, it was proved that the price paid by the defendant to S was the full value of the land at the time, and that the defendant was satisfied with a transfer of possession of the property and a mere receipt for the money, on being assured that there were no title deeds.

Held, there was no constructive notice to the defendant of the trust, but even if there had been notice, the plaintiff was a volunteer within the statute of 27 Eliz., and the trust in his favour was avoided by the subsequent sale for value.

The principle to be applied by the Court in a case of this character was the same as that laid down for the guidance of the Court of Claims, viz., that the right to obtain the grant and to retain it must depend upon "*the real justice and good conscience of the case.*"

THE facts and argument are set out in His Honor's judgment.

MANNING, J. This case was argued before me on the 8th and 15th instant, by Mr. Donnelly and Mr. Lowe for the plaintiff, and Mr. Broadhurst and Mr. Fisher for the defendant.

The pleadings and part of the evidence are shortly set out in the judgment delivered upon the motion for a commission. For the present purpose further portions of the evidence must be noticed. It was sworn by Melville, that the land now in suit was "granted" to him by Governor Macquarie, who told him to take his pick of the ground, that Surveyor Mehan should measure in Sussex street; and that he chose this allotment, and never had, nor looked for any other title. He further stated, that after building a house, and occupying it for five or six years, he sold to Cradock for £30, and signed a paper, dated July 7, 1819, which was put

(1) *The Sydney Morning Herald*, Sept. 25, 1848. Cited in *Cockcroft v. Hancy*, post and 9 S.C.R. App. 11.

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in evidence, and which was a very illiterate agreement, to bargain, to sell, assign, &c., the premises, and all his right and title thereto to *Cradock*, in fee, in consideration of £15 in hand, and £15 payable in six months. Shortly afterwards he gave up possession to *Cradock*. On the 26th September, 1822, an indenture was duly executed by *Cradock* and by *Spenser*, senior, which purported to be between those two parties only, and by which, after reciting that *Cradock* was seized and possessed of the premises, and indebted to one *Dempsey* in £6, and that being somewhat stricken in years, he was desirous to provide for suitable and Christian funeral, it is witnessed that *Cradock*, in consideration of £6 paid on his account to *Dempsey* by *Spenser*, senior, and that *Spenser*, senior, should defray his funeral expenses after the manner of a decent Christian burial, thereby granted, bargained, &c., unto *Spenser*, senior, *in trust for his son* (the plaintiff), for him, his heirs, and assigns, for ever; and in case of the death of the plaintiff during his minority, then the premises to be the property and possession of *Spenser*, senior, in fee. The deed further concludes with a covenant from *Cradock* to *Spenser*, senior, for good title and against incumbrances. On the back are two indorsements, of which one is a receipt by *Dempsey* for the £6, and the other a memorandum under the hands and seals of *Cradock* and *Spenser*, senior, that possession was to be taken at the time of the funeral, after the body of *Cradock* had left the house, and that the writings and title deeds of whatever kind were with that indenture handed over to *Spenser*, senior.

The plaintiff read as evidence from the defendants answer, admissions that *Melville* was in possession by right of occupancy, that *Spenser*, sen., purchased of *Cradock*; that *Cradock* did on or about the date of his deed deliver up possession to *Spenser*, sen.; that except the grant no conveyance was ever made to the defendant; that the proclamation mentioned in the bill was issued, and that the defendant applied to the Crown for a grant, and that he alleged, as in the bill is alleged (i.e. that he was the lawful representative of *Spenser*, sen., and that *Spenser*, sen., was the person who, on or before the date fixed by the proclamation, was *bonâ fide* in possession by mere right of occupancy), so far as a claim to have his contract with *Spenser*, sen., and his title thereunder carried into effect, and completed by a grant under the proclamation, constituted such allegation; that a deed of grant had issued to him, his heirs, and assigns, from the Crown, and that the rights of all parties other than the rights therein were reserved; that defendant had been in possession ever since 1824; and that the plaintiff was an infant during the greater part of that time.

For the defendant, the receipt of *Spenser*, sen., acknowledging the receipt of £160 from the defendant as "being payment of" the premises in question and another house, was put in, upon proof of the handwriting of a deceased attesting witness. It was also shown that in 1824 the premises in question were worth about £60, but that the property had much increased in value since then. The points of argument, which were numerous, appeared to be as follows :—

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For the plaintiff, that the original promisee and his assigns had a defeasible fee simple, and that such an estate could not be defeated by the Crown without an inquest of office; that the grant was only to be regarded as a confirmation of the title previously existing. *Eyston v. Simonds* (2). That the case should, therefore, and by reason of the usual words of reservation of the rights of others in the grant, be disposed of in the same way as it would if the grant had been issued to *Melville* prior to his transfer to *Cradock*, or as if the grant were altogether out of the question. *Walker v. Webb* (3) *coram a'Beckett, J.*, and *M'Intosh v. M'Intosh* (4), *coram Manning, J.* That the instrument of conveyance from *Cradock* operated as a bargain and sale, whereby the legal estate vested in *Spenser*, senr., and the equitable estate in the plaintiff, subject to the contingency which has failed of his death under age; that the defendant having purchased without any conveyance specifying the extent of interest intended to be transferred, must be taken to have actually bought only such estate as *Spenser*, senr., had in his own right, and therefore to hold like him in trust for the plaintiff; that assuming the contract to have been for the fee, subject only to the right of the Crown, yet that the defendant had constructive notice of the plaintiff's equitable interest because he took without any muniments of prior title, and was responsible for his own negligence in not having made enquiry as to the state of the title by learning from the Government the name of the original promisee, and ascertaining from him and *Cradock* to whom they had respectively sold, and by what instruments they had conveyed. *Hiern v. Mill* (5); *Gibson D'Este* (6); *Stuart v. Foulkes* (7); *Jackson v. Rowe* (8); that the conveyance from *Cradock* was not a voluntary conveyance to plaintiff within the statute of 27th Elizabeth, so as to be void under the statute against a subsequent purchaser for valuable consideration, because it was a purchase in the name of the plaintiff, and not a distinct settlement made by the father. *Lady Gorge's case* (9); 3 *Sugden, V.*, and *P.* 267; *Edwards v. Jones* (10);

(2) 1 Y. & C., Ch. 612. (3) *Ante*, p. 253. (4) Not sufficiently reported. (5) 13 Ves. 122. (6) 2 Y. & C. 570. (7) Reserved judgments, Supreme Court. (8) 2 Sim. & Stu., 472. (9) 3 Cro. 550. (10) 1 M. & C. 237.

1848. *Brown v. Cavendish* (11); that there was no proof as against the plaintiff that the defendant was a purchaser for value, the receipt of *Spenser*, senr., being evidence only against himself and those claiming under him by subsequent title. *Doe dem. Hawley v. Brown* (12); and, lastly, that the defendant was estopped from setting up title under his grant, because the defendant claims under *Spenser*, senr., and the latter under *Cradock*, who and all claiming under him, it was contended, were estopped by the recital in his deed that he was then seized of the land. *Bensley v. Burdon* (13); 1 *Phil. on Ev.* 360; *Palmer v. Ekins* (14); *Beckett v. Bradley* (15); *Doe v. Stone* (16).

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For the defendant it was argued that his plain legal title must prevail, unless the plaintiff could make out a clear equity so as to fix him with a trust; that the legal estate under the grant can only be defeated by proof that it was obtained *malâ fide*, *Story's Eq. Jur.* 319; *Walker v. Webb* (17), cited *contra*; that the proclamation in 1829 could not prejudice defendant's rights acquired in 1824, and that the estate of the parties at that time was no title at all against the Crown, so as to prevent the Crown from granting effectually to the defendant *Doe dem. Watt v. Morris* (18); that the purchase from *Spenser*, sen., was an absolute purchase of the right by occupancy; that the operation of the conveyance from *Cradock* was not to clothe *Spenser*, sen., with a fiduciary character, but to vest the property in the son, subject to avoidance by subsequent sale for value; that a purchase from a trustee without notice of the trust takes the estate discharged from such trust, *Lewin's Trusts*, pages 3, 9, 19, 206-7, 358-9, *Story's Eq. Jur.* 329; that no constructive notice of the trust was raised by the absence of further enquiry, after *Spenser*, sen., had denied the existence of any title deeds, there being no proof of any thing having been brought to the defendant's notice, which should have put him upon such enquiry as would probably have led to the discovery of the plaintiff's title, *Sugden's V. and P.*, 1052; *Jones v. Smith* (19); *West v. Reid* (20); that the trust for plaintiff, created by *Cradock's* deed, made him a volunteer within the statute of Elizabeth; that it was not necessary for the defendant to prove value paid on his purchase otherwise than by the receipt, for this is the converse of *Doe d. Hawley v. Browne* (21), and it is for the plaintiff, who as a volunteer seeks to impeach the defendant's legal title, to negative the *prima facie* consideration, which he has not done; that if in the absence of other proof of consideration paid, the defendant was to

(11) 1 Jones & La T. 603. (12) Res. judgments, Supreme Court. (13) 2 Sim. & Stu. 519. (14) 2 Ld. Ray. 1552. (15) 8 Jur. 1073. (16) 10 Jur. 480. (17) *Ante*, p. 253. (18) 2 Scott 276. (19) 1 Hare 43. (20) 2 Hare 249. (21) Res. Judgments, Supreme Court.

be taken as a volunteer, his equity would be of equivalent rank with that of the plaintiff, and his legal estate would give him the better right to hold; and that the alleged estoppel had no operation upon the defendant in this case, but only upon *Cradock* and persons who might claim under him by title subsequent to the conveyance to *Spenser*.

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Of the numerous points raised in support of the plaintiff's case, several appear to have received too clear answer in the course of the argument to require particular notice now. I shall therefore direct my attention only to some points which appear to me to call for a distinct statement of my views, and which I think conclusive against the plaintiff.

Considering the case independently of the grant, these questions arise: Whether the defendant purchased the fee simple or only the interest of *Spenser*, senr.; whether he took with notice of a trust in favour of the plaintiff; and whether the plaintiff is not a mere volunteer under *Cradock's* deed, and the defendant a *bonâ fide* purchaser for value so as to defeat the voluntary settlement? That as between *Spenser*, senior, and the defendant, the purchase was of the freehold subject only to the right of the Crown, I have no more doubt than if the former had executed a formal conveyance reciting a seisin in fee and conveying in fee to the defendant. The receipt and a part of the answer which was read are sufficient to establish this point.

In considering the question as to notice, I may proceed upon the assumption that the plaintiff is right in contending that *Cradock's* deed vested the legal estate in *Spenser*, senior, and that plaintiff was a *cestui que trust*. This was necessary for the plaintiff to contend, because otherwise if (as was insisted for him) the grant operates only to confirm the estate already in existence, his remedy would be by ejectment under his legal title, and not by bill in equity. Of actual notice of the trust there was no evidence, and the only circumstance relied upon to fix the defendant with constructive notice was the fact of his taking *Spenser*, senior, without any muniments of title; but it was said that the rule *caveat emptor* should be applied, and that in taking without proof of title the defendant was wanting in proper caution, and ought to be fixed with notice of all that he would have been acquainted with if he had taken measures to trace the title. This argument would undoubtedly have had great weight if the state of titles had been the same here, and with reference to this particular property, as in England; but it must be remembered that in the year 1824 much of the land in Sydney was held under verbal promises from Governors, and

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by rights of occupancy depending upon more doubtful commencements, and that in the comparatively simple state of things at that time interests in land passed from hand to hand with almost as little formality as chattels. Nor is it to be lost sight of that in this particular instance *Melville* had acquired it by "right of occupancy" according to the bill, or by the most loose verbal promise according to his own evidence; and that the defendant himself was content to pay his full purchase money upon a mere receipt. It must also be observed that at the time of the purchase, *Spenser*, senior, was in possession and ostensibly the owner; and although the defendant's unread statement that he asked for title deeds, and was told and believed there were none, cannot be referred to as evidence, I will not in the face of that statement, and without proof to the contrary, assume that such enquiries were *not* made, or if made, met with a different answer. I shall assume that what is stated may have taken place: and if so, it would be carrying the doctrine of constructive notice beyond the bounds of principle, to say that under the circumstances the defendant was bound to go further and ascertain who was the first occupant and trace the title down to him. But even if he had done so, what would have been the probable result? From *Melville* he might have obtained some information about the paper which he signed; but from that point all trace would have been lost, because in the absence of other proof I must infer from the indorsement on the conveyance that *Craddock* was dead before *Spenser*, senior, obtained the possession which is stated in the bill and proved to have preceded the sale to the defendant. My opinion therefore is that there was no such constructive notice as would fix the defendant with the trust.

I also think that the plaintiff was a volunteer within the statute of 27th Elizabeth. *Lady Gorge's case*, and the passage from *Sugden* grounded upon it, which were cited to show that a purchase of land by a father "in the name of his child" cannot be defeated by a subsequent sale for value by the father, do not appear to me to apply. In that case it is merely stated that the purchase was "in the lady's name," which I understand to mean that she was ostensibly the purchaser on her own account through the instrumentality and with the money of the father; but here upon the face of the deed the purchaser is the father, who also is a party to it, who is made trustee with a beneficial remainder—with whom the covenant for title, &c., is made—to whom the title deeds, &c., are delivered—and who is to have the possession. The creation of the trust by *Craddock* for the son is either wholly unauthorised, and then a resulting trust would arise in favour of the person who

advanced the purchase money, or it was by the direction of the father without consideration other than natural love. The latter may be taken to be the case here, since the father is a party to the deed and regularly executed it, and as equity looks to the substance of things, I cannot understand how it can make any difference, that instead of the father taking an intermediate conveyance, he directs a conveyance to himself in trust for his son, and executes the conveyance by which such trust is created. Then, is the defendant a purchaser for valuable consideration, so that my view of the last two points can avail him? I think there is sufficient evidence that he is so; that if there were not, still the plaintiff who has to overcome the defendant's title should have impeached the consideration if he meant to rely upon this ground; and that if evidence upon the point were now required, I ought still to allow it to be taken, rather than make a decision which, unlike a judgment in ejectment, would be conclusive, against the defendant's title, on account of a mere lapse in the formal proof of what no man can doubt. The proof of the fact consists in this, that *Spenser*, senior, gave a receipt for the money, and delivered the possession to one who was a stranger unless by purchase; that the plaintiff's bill not only does not impeach the consideration, but impliedly admits it; and that the plaintiff has read the defendant's admission that "he purchased," which usually imports the payment of a consideration.

I now come to the consideration of the grant; and here let me remark that the grant was not put in, and that although we have the fact that a grant issued, we are not informed of its contents further than that it gives the land to the defendant in fee, and that it contains the reservation mentioned. Whether, therefore, it refers to the promise to *Melville* I do not know; but as neither the bill nor the answer allude to it, we may rather suppose it is issued by virtue of the occupancy by *Spenser*, sen., in 1823, and of *General Darling's* proclamation. This might be material. I do not yield to the argument that the grant operated only as a confirmation of the previous title, or that by reason of the reservation or anything else shown in this case, the title of these parties can be discussed as if the grant were out of the question. The grant I look upon as a good title to the grantee named in it, unless he can be fixed with a trust, or unless it has been obtained under circumstances which make it revocable. If the party who received the grant from the Crown, claimed and obtained it in virtue of some inferior interest to which a trust was annexed, he could not by this act of his own divest himself of his fiduciary character; and the large estate acquired by him would be still charged with the trust, and might be

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made the subject of directions by this Court. But if the position of the parties be that the grantee held by a title *adverse* to another, I do not see on what principle this Court can interpose in the way now sought, in the absence particularly of the Crown as a party. Substantially the effect would be to repeal the grant, and to give a new one to another party, without the intervention of the Crown. The reservation relied on is very vague and of most questionable effect. Instead of being, as ordinarily, of something to the grantor, it purports to be in favour of mere strangers to the deed. It would be singular that such a clause should be sufficient to make a plain grant to A operate (without reference to the party making the reservation) as a grant to B or to any man who can at any time show that he had a better or more strictly legal claim upon the honour of the Crown. If it has that effect, then the Commissioners of Claims, with their advertisements, evidence, and judicial reports, were worse than useless; and the Royal grant, instead of quieting men's possession, carries upon its face a perpetual warning of its uncertainty. In place of giving security to purchasers, the grant may help to make bad titles pass current, but as between subjects will give no greater certainty to those that are otherwise good. It occurs to me, also, that however good a *prima facie* title may be acquired by the specific promise of one Governor, or the general one of another by his proclamation, yet that when a right of one man by a deduction of title from the promisee is set up to defeat letters patent issued by the Crown itself to another, and the Crown is not made a party, it might be expected that the claimant shall clearly show that the promisor was duly authorised to bind the Crown, which by his promise became a mere naked trustee for such party as should prove title thereunder according to the strict rules of law.

I now come to a point which involves the broadest, and as it seems to me the most satisfactory ground of adjudication. It is this, that the right to obtain the grant and to retain it when questioned in this Court must depend upon "*the real justice and good conscience of the case*;" and that in my opinion the application of this test to the present case is decisive in favour of the defendant. Here the claim to a grant arises either upon the loose promise or permission to *Melville*, and the occupation under it, or upon the occupation by *Spenser*, sen., at the date fixed by Governor *Darling's* proclamation. The latter might be insisted upon, because the bill rests the claim upon *Melville's* occupancy, and not upon any original promise. In either way the promise was an act of grace, which it would have been difficult if not impossible to enforce the performance of. But after the promise of Governor *Macquarie*, and

before the proclamation or the application for this grant, the Legislature of the colony, with the sanction of the Crown, passed the several Courts of Claims Acts, 4 William IV, No. 9, 5 William IV, No. 6, and 5 William IV, No. 21, without noticing the language of the earlier Acts, it is sufficient to say that the Act which continues in force, was passed for the purpose of "settling disputed claims to grants of land;" that it empowers the Governor to refer to the commissioners all claims to grants in virtue of any promise of any Governor; and empowers the commissioners to proceed to hear, examine, and report thereon, and, for that purpose to issue notices in the *Government Gazette*, and to summon witnesses, and take evidence on oath, and require production of documents, &c., so far as they shall be necessary for the due investigation of any claim; and that in hearing and examining all claims, the commissioners are to be "guided by the real justice and good conscience of the case, without regard to legal forms and solemnities," and in case they shall be "satisfied that the person claiming is entitled in equity and good conscience to hold the lands claimed, and to have a grant thereof under the Great Seal of the colony," they are to report the same and the grounds thereof to the Governor for his information and guidance, but so as not to oblige the Governor to make and deliver any such grant unless he shall deem proper. From this enactment, which is law of the land, and by which the ordinary rules as to the devolution or proof of titles were capable of being altered, I infer, first, that the commissioners were intended to settle disputes finally as between subjects, but not absolutely as against the Crown; secondly, that the Crown, as represented by the Governor for the time being, was not understood to be absolutely and legally denuded of all discretion or power as to the issue of grants or the selection of grantees; and thirdly, that in deciding on all claims the Commissioners were bound, and the Governor intended to be guided, by popular and rational views of justice and good conscience, having reference to the simple practices of a young country and the peculiarities of this colony, as well as to the special circumstances of each case—and not by the arbitrary rules which have been thought expedient for regulating the more complicated regulations of an older state. And from these inferences I conclude that the only appeal from the Commissioners which the Legislature contemplated was to the Governor; and that if indirectly a question arises before the Supreme Court as to the right to the benefit of a grant under a Governor's promise, the same principle must guide the Court as was imposed upon the Commissioners; for it cannot have been intended that the latter should decide upon the right to "hold the lands and have a grant thereof" upon one principle,

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1848. and that this Court, *even if a direct appeal had been given*, should in
 SPENSER effect reverse the grant upon principles other than those which are bind-
 v. ing upon the Commissioners, and which are pointed out for the guidance
 GRAY. of the Minister of the Crown.
 Manning J.

Applying this rule to the present case, I entertain no doubt that this plaintiff, who, as a young infant was made the subject of a voluntary settlement by his father, ought not in "real justice and good conscience" to be permitted to recover land which that father purchased, paid for, possessed, and sold as his own 24 years ago, and which has been greatly increased in value in the defendant's hands—upon the simple ground that the defendant relied too implicitly in the honesty of the father whose intended bounty is the sole foundation of the plaintiff's claim. The judgment of Mr. Justice *a'Beckett* in *Walker v. Webb* (22), which was much relied upon by the plaintiff's counsel on account of certain passages contained in it, appears strongly to bear out the view taken by me on this last point. His Honor it is true decided in that case against the grantee, but he did so on the grounds that the grant being issued by reason of a stipulation in a lease, and not of a Governor's "promise," the case was not strictly within the jurisdiction of the Court of Claims, and that the grantee had obtained his grant by "concealment and misrepresentation," and by a "false suggestion;" so that upon the whole of the case he considered retention of the grant would be "*unconscientious*." But His Honor expressly says, "I will admit that unless it be unconscientious for the defendant to retain the benefit of the Commissioner's decision, it ought to be conclusive;" and the whole tenor of his judgment indicates an opinion that the grantee is entitled to the full advantage of his grant, unless under the circumstances, "natural justice" demands that he should be compelled to give the benefit of it to another. In this case, so far am I from thinking that natural justice demands that the land should be conveyed by the defendant to the plaintiff, that I conceive the principle laid down by the Legislature, would make it incumbent on the Court to come to a decision in favour of the defendant, if the question were now entirely an open one.

In deciding this case, some one of the points discussed would perhaps have been sufficient; but the several questions which have been noticed above having fairly arisen in the case, and being of much importance, I have thought it right to give full consideration to each.

Bill dismissed.

THE BANK OF AUSTRALASIA v. BREILLAT, *Chairman, &c.*,
of the Bank of Australia. (1)

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Privy Council—Jurisdiction—Interest on amount of verdict—Costs of entry of judgment on appeal—Promissory note.

*Stephen C.J.
Dickinson J.
and
Manning J.*

Plaintiff, recovered a verdict on a note, with interest to that date, but on appeal to the full Court, a verdict was entered for the defendant, and a certain sum recovered from the plaintiff by *fi. fa.* thereon. This was again reversed by the Privy Council, and the amount of subsequent interest at the same rate as previously allowed was ordered to be paid to the plaintiff, and costs, &c.

Held, the Privy Council had jurisdiction to order the payment of interest, subsequent to the verdict. But if not, this Court would not hear argument on the matter.

The interest was to be calculated, not on the verdict, but upon the amount of the note, and from the day after the verdict to the day on which judgment must be signed—both days inclusive.

Costs of the application (to enter the judgment of the Privy Council on the roll), over and above those mentioned by the Appellate Court, also allowed.

In this case, which was tried at bar on the 4th day of August, 1845, the Jury found a verdict for the plaintiffs, and assessed their damages at £175,703 18s. 7d., being the amount of the note, £154,000, and interest upon that sum at the rate of £8 per cent. (£21,703 18s. 7d.). Subsequently, the majority of the Court being of opinion that the defendant was entitled to succeed, ordered the judgment of this Court to be entered on the rolls in favour of the defendant. The matter was afterwards carried, on appeal by the plaintiffs, to the Queen in Privy Council, and after the Privy Council had reported upon the case, Her Majesty on April 15, 1848, ordered the judgment to be reversed, and that the original judgment for the amount found due by the verdict and costs, and that the amount of subsequent interest at the same rate at which it was calculated by the verdict be paid by the defendant to the plaintiffs, together with the costs, &c.; and that this order be duly obeyed, complied with, and carried into execution by the Judges of the Supreme Court, &c.

On October 5, of this year, a rule *nisi* was granted, on the application of Mr. *Broadhurst*, calling upon the defendant to show cause why the order of Her Majesty should not be entered on the judgment roll, and

(1) *The Sydney Morning Herald*, Oct. 6 and 10, 1848.

1848. why a reversal of the judgment entered upon the said roll, and signed
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 BREILLAT. for the defendant on September 8, 1845, with an order of restitution of the sum of £1,844 19s. 2d., recovered from the plaintiffs by the defendant under the said judgment, and the writ of *fi. fa.* issued thereon, should not also be entered on the said roll, and why it should not be referred to the Prothonotary of this Court to compute interest upon the sum of £175,703 18s. 7d., being the amount found to be due to the plaintiffs by the verdict of the Jury on the trial of the said cause, at or after the rate of eight per cent., from the 8th day of September, 1845, being the day the said verdict in the said cause was given, until the day such interest shall be computed by the said Prothonotary; and that the said sum of £1,844 19s. 2d., and the aforesaid interest when computed, be added to the damages assessed by the said Jury on the trial of this cause; and why the plaintiffs should not, in obedience to and in compliance with the said order of Her Majesty in Council, be at liberty to enter up and sign final judgment as of the 8th day of September, 1845, for the aforesaid sums of £175,703 18s. 7d., £1,844 19s. 2d., and the interest which shall be computed and allowed as aforesaid, &c., and for costs of this application, &c.

The *Solicitor-General* (*Broadhurst* with him) now moved to make the rule absolute, and in compliance with a suggestion from one of their Honors, when the rule was granted, asked that the interest might be ascertained and entered on the roll separately, and not as in the rule.

Fisher and Lowe, contra. The Privy Council is a Court of Error, and can only give such judgment as the Court appealed from could have given. This Court cannot give interest upon a verdict except in cases where a defendant appeals for the sake of delay. Interest on the verdict is not expressly ordered, or authorised by the order. The rule asks for what would be compound interest on a part of the verdict. Up to what date, too, is the interest to be calculated; the order is uncertain. The plaintiff is only entitled to simple interest and that to the date of the judgment of the Privy Council.

The CHIEF JUSTICE and DICKINSON, J., agreed that it was clear that the Privy Council had jurisdiction to direct the payment of interest; at any rate, if they had not, it would not be respectful of this Court to hear any arguments on the question.

MANNING, J., who had been counsel in the cause, gave no opinion.

The *Solicitor-General* and *Broadhurst* in reply.

The CHIEF JUSTICE then delivered judgment on the remaining point. He said he was clearly of opinion, that upon applying the ordinary rules of construction to the report and order, that the plaintiffs were only entitled to have interest calculated upon the amount of the note. Such opinion was arrived at after a careful analysis of the different parts of the order, and it was also clear that that opinion was in accordance with the intention of Appellate Court. This conclusion, too, was in accordance with what is in general done in England, in cases of appeal of this kind. The plaintiffs will therefore be entitled to interest at the rate of £8 per cent., to be calculated upon the sum of £154,000 from the 5th day of August (the day after trial) until to-day, the 9th of October, both days inclusive; in addition, too, they will be entitled to the costs occasioned by this application, over and above what has been mentioned by the Privy Council.

DICKINSON, J., concurred in the judgment of his Honor the *Chief Justice*, and also his Honor Mr. Justice *Manning*, who added that though he intended at first not to take any part in the judgment, yet as he agreed in the opinion of the Court, as to the last point, and as his opinion was against his late clients, no harm could ensue from expressing it.

Order accordingly.

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EALES v. DANGAR. (1)

July 13.

Stephen C.J.
Dickinson J.
and
Manning J.

Bond—payment into Court—4 Anne, c. 16, s. 13, and 8 & 9 Will. III, c. 11, s. 8—reference to Prothonotary—equitable principles.

The statute, 4 Anne, c. 16, s. 13, gives to the Court an equitable jurisdiction, to be summarily exercised, to allow the defendant, in an action on a bond, to pay the amount due into Court, and in case the amount is in dispute, to refer the matter to the Prothonotary for a report thereon. The Prothonotary may also be ordered to report upon facts necessarily involved in the question of the amount due.

Notwithstanding the condition of a bond be the payment of money by some person other than the obligor, and by instalments, the statute still applies.

When the bond discloses the fact that other persons, besides the sole obligee, are interested, the condition being, to pay him or one of two other persons, according as they should severally be entitled, payment to the obligee may be in fact no payment for the purposes of the action, and beyond the question what payments have been made, a further enquiry is necessary, to whom they were made, having regard to equitable principles.

ACTION on a bond, made for the payment by the defendant of a certain sum, in instalments, with interest half-yearly, to the plaintiff, or to Colonel George Barney, or to the person or persons who should, under the circumstances recited in the condition, be entitled to receive the same. The original debtor was one *Button*, and the condition was in terms for payment by *Button*, for whom the defendant was in effect surety. *Button* was not a party to the bond, and was not proved to have paid anything, but the defendant had paid certain sums, and now claimed to be entitled to pay the balance into Court, under 4 Anne, c. 16, s. 13. These payments had been made to *Eales*, in whose name the action was brought, but who was not then entitled, of which fact it was maintained the defendant had notice.

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Dec. 27.

Grant, attorney for the defendant, applied, before the *Chief Justice*, in Chambers, for leave to pay into Court the sum of £466 Os. 3d., in satisfaction of plaintiff's claim. 4 Anne, c. 16.

Broadhurst, for the plaintiff, contended His Honor had no such power, either by common law, or under the statute. He also read an affidavit showing that, in November, 1846, the defendant had notice and admitted that Colonel *Barney*, and the Bank of Australasia, were the parties interested in the bond.

(1) *The Sydney Morning Herald*, Jan. 1, April 24, July 14, 1849.

THE CHIEF JUSTICE. On considering the case of *Bonafous v. Rybot* (2), and especially the observations of Lord *Mansfield*, in p. 1373, and *Tighe v. Crafter* (3), I have no doubt that the 4 Anne, c. 16, s. 13, applies to this case, and that, if a Judge can stay the proceedings, where the amount of "principal and interest due" is *admitted* on both sides, or is clearly *ascertainable* from the bond and condition, or from the bond and articles of agreement, the Judge must equally have jurisdiction to refer it to an officer of the Court where the amount is in dispute, to report what is the "principal and interest due." It is no answer to say that the facts in dispute should be tried by a jury. They cannot be so tried, because there is no plea, either at common law or by s. 12 of the 4 Anne (see *Hamden v. Clarke* in this Court) of *part payment* of a bond (4). But that seems to me to be no reason why the plain words of s. 13 should not have effect, on a defendant bringing into Court "all the principal money and interest due." In cases of dispute before the Court or a Judge, the course is to refer to the officer for his finding, or I might direct an issue as to the sum due.

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BALES

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The case of *Tighe v. Crafter* has been misunderstood. It is so very brief, as to admit of misconstruction on a cursory reading. But that case, as it appears to me, only goes to the same point as *Bonafous v. Rybot*, i.e., that where, by the terms of the bond, default in payment of interest, or an instalment, makes *the whole debt fall due*, there the bringing of such interest or instalment into the Court will not suffice. To hold that the 4 Anne, c. 16, s. 13, did not extend to any case where the bond was forfeited (i.e., where the penalty was due at law) would be to render the section a dead letter. For no bond can be sued on, *until* "forfeited." And then the statute s. 13 steps in and operates by allowing the defendant, nevertheless, to bring *what is due* into Court. That must clearly mean the whole sum then payable under the condition (i.e., the whole money mentioned, if none has been paid off, or the balance, after allowing what has been paid). I can conceive no other construction consistently with common sense.

Mr. Justice *Manning* has conferred with me on the subject, and concurs with me. And, I would add, that I think the Court has this jurisdiction at law, without the aid of the statute (see Lord *Mansfield's* opinion, *ubi supra*.) It would be monstrous to send the defendant into Equity, to obtain a relief, which we ought to grant here. The money, in fact, due is not the penalty, and one wonders that the Courts should have ever thought otherwise.

(2) 3 Burr. 1370.

(3) 2 Taunt. 387.

(4) No report of this case available.

1848. . As to the peculiarities of this case. The payments should have been
 EALES to *Eales, or the person entitled* ; and in strictness, therefore, a payment
 v. to either would (in law) be an answer. But I think the Order should
 DANGAR. recognise, only, payments to the person really entitled equitably to
 Stephen C.J. receive them. Consequently I order,—

First. That the defendant pay into Court forthwith, the amount admitted by him, the plaintiff's attorney having leave to take the same out, without prejudice to his claim to receive more.

Secondly. That it be referred to the Prothonotary to enquire, (taking evidence by affidavits or *virâ voce*, as he shall think fit, as well of the parties as witnesses), and to report what is the amount of principal and interest due on the bond of the defendant.

Thirdly. That, however, in taking the account of what is so due, he shall exclude from the credit side every payment to, or set off against *Eales*, made or sought to be acquired, after notice or knowledge of the right to receive payment being in a third party.

Fourthly. That all proceedings be in the mean time stayed until further order.

Fifthly. That the question of costs, and any order as to bringing any further sum into Court, or allowing the action to proceed, or entering a judgment of satisfaction under a statute, be reserved until after the coming in of such report ; and each party is to have leave to apply to a Judge on its coming in.

The report afterwards made by the Prothonotary was not in accordance with clause 3 of the Order.

A rule was afterwards obtained for the plaintiff, calling on the defendant to show cause why the order of the *Chief Justice* should not be set aside, as having been made improvidently, and also why the report of the Prothonotary should not be set aside.

1849. *Lowe*, for the defendant, now showed cause. The plaintiff, having
 April 23. appeared at the reference, has waived all right to object to the power of His Honor to make the order. The reference was in its nature equitable, and it would be unfair to cause the defendant to pay over again.

The *Solicitor-General* and *Broadhurst*, for the plaintiff. The report is bad on the face of it, even if His Honor had jurisdiction to make the Order. The statute confers power on the Court *only* in matters of simple computation.

Cur. adv. vult.

The judgment of the Court was delivered by

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The CHIEF JUSTICE. In this case, the plaintiff on the record was the obligee of a bond, of which the condition was, to pay a certain sum to him, *or* to Colonel *George Barney*, *or* to the person or persons who should under the circumstances recited in the condition, be entitled to receive the same. The original debtor, as it appeared by recitals in the condition, was not the defendant but one *Button*; and the condition was in terms, for payment by *Button*, for whom the defendant in effect was surety. The debt was payable by instalments, with interest half-yearly. It was not shown that *Button* had ever paid any thing; and he was no party to the bond. The defendant, however, had paid sundry sums of money for him, or on his behalf, in pursuance (as he alleged) of the condition; and on his being sued, he applied under the 4 Anne, c. 16, s. 13, for leave to pay the balance into Court, and that the action might thereupon be stayed.

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The application was made to myself in Chambers, and not to the Court, which was then not sitting. No objection, however, was taken on this ground. The application was opposed, on the general ground that the statute did not extend to a case of this kind; and it was insisted, further, that the payments relied on were not in pursuance of the condition, but had been made by the defendant in his own wrong, to a person whom he knew to have no claim to them.

The money for which the bond was given, was a mortgage debt originally due to the plaintiff, but the debt had been assigned, prior to the execution of the bond, as the condition itself recited, in the first place to Colonel *Barney* and (subject thereto) to the Bank of Australasia, who were the real parties suing. The payments, however, now in question, had been made to *Eales*, in fraud (it was said) of those parties; and it was submitted, that facts of this unusual kind could not be inquired into, on a summary application.

It was my opinion, after conference with Mr Justice *Manning*, and considering the cases of *Bonafous v. Rybot* (5) and *Tighe v. Crafter* (3), that the enactment in question applied; and that, as it was necessary to ascertain what was due on the bonds, I had purely to direct a reference to the Prothonotary for that purpose. An order was accordingly made by me, *first*, giving the defendant leave to pay into Court, and the plaintiff to take out, the amount admitted to be due; *secondly*, that the Prothonotary should inquire and report (taking evidence by affidavits or

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examinations, as he should think fit) what sum if any remained unpaid; but, *thirdly*, that in taking such accounts he should exclude every payment to, or item of set-off against, the obligee *Eales*, made or arising after notice, or knowledge, of the right to receive payment being in a third party. The money admitted to be due was, accordingly, paid into Court, and the Prothonotary then proceeded to inquire, under my order, whether any further sum was due. It appears, however, that instead of ascertaining such balance by giving credit only for sums paid to the proper party, the Prothonotary has taken into account all payments, made to any of the parties mentioned in the conditions, and he has reported, therefore, simply, that the bond is satisfied. But the Prothonotary has entered into no question, under the third clause of the Order, as to the party entitled to such payments; nor has he made any inquiry, as to the defendant's knowledge who was that party.

On the ground of those omissions, the party suing moved last term to set aside the Prothonotary's report. He sought, also, on the ground of the non-applicability of the statute, to set aside my order. On this last point, the arguments urged on the application in Chambers were renewed, and it was contended, that no such reference could be directed to the Prothonotary, because he has no power to compel the attendance of witnesses.

We have considered this case, and, with respect to the order, although not until after much hesitation, we are all finally of opinion that it was rightly made. It is clear, from the case of *England v. Watson* (7) that the defendant could not have pleaded a plea of payment into Court, even had the condition been to pay alone to *Eales*. And that case, and the case of *Murray v. the Earl of Stair* (8) appear to furnish authority for holding that a bond for the payment of money on a contingency, for instance (which is a case stranger than the present) is within the statute of 4 Anne; so as to admit of money being, by leave, brought into Court under the 13th section. Yet in many cases of that kind, no computation of the sum due could be made, by the officer of the Court, without inquiry into facts and dates independently of mere computation. "Under the statute of Anne," says Baron *Alderson*, in *England v. Watson*, "the Court is to ascertain, through its officer, the amount due for principal and interest, and costs, and to discharge the defendant from the debt." But the question what is due, as every one will perceive, will frequently involve questions of fact which may be disputed on either side. The jurisdiction given to the Court by the statute, in the 13th section, is an

(7) 9 M. & W. 334.

(8) 2 B & C. 91, 93.

equitable one, to be summarily exercised. The section enacts, that if the defendant shall bring into Court all the principal and interest, due on the bond, with all the costs which may have been incurred, the Court shall give judgment to discharge the defendant. The amount of such principal, therefore, and interest, is the first question to be ascertained. But this will depend on the number, and amount of the payments previously made, if any, and the dates of such payments. Surely it would be strange to hold that the enactment might be rendered inoperative, in every case, at the discretion of the party suing, by his thinking fit to dispute any such payment. If the facts, however, are to be inquired into, the Prothonotary is here the officer to inquire into them. And then, if he has authority given him to inquire, the ancillary and subordinate power, without which he could not effectually exercise that authority, would seem on the ordinary principles of law to be included.

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We have not failed to notice the peculiar character of this bond, in the respect that the condition is for the payment of money by instalments, and by a third person. As to the latter point, it is clear that the 13th section of the 4 Anne, under which my order was made, extends only to cases which are within the 12th section. But that section has not been hitherto applied to any other than cases of money payable by the obligor himself. The words of the 12th section are: "If the obligor, before the action brought, pay to the obligee the principal and interest due by the condition, although the payment was not made strictly according to the condition, yet it shall be pleaded in bar," and so on. The provision would seem only to contemplate, therefore, payments made by the obligor, in discharge of sums due (that is to say, due under the condition) *by such obligor*; whereas, here, the condition was for payments to be made by *Button*, a stranger. We think, however, that the present case, where the payments have in fact been made by the obligor, is within the spirit, as it falls within the letter of the enactment. Substantially, the payment was to be by him, in default of payment by *Button*; and the payments relied on were made by the defendant for *Button*.

The 13th section then provides for the defendant bringing into court, "at any time pending an action upon such bond," the principal and interest due on it, with the costs expended; which money so brought in, "shall be taken to be in full satisfaction of the bond, and the Court shall give judgment to discharge the defendant from the same." It might reasonably be doubted, therefore, whether this enactment applied to any case where the money, when brought in, could not be in full

1849. satisfaction; as, for instance, where the amount secured is payable by instalments, and the day for payment of some or one of them has not arrived. The difficulty is the greater by reason of the decisions on the 8 and 9 Will. III, c. 11, s. 8, which are to the effect, first, that allbonds for the payment of money by instalments are within the latter enactment, and, secondly, that bonds within that enactment (see the judgment of *Holroyd J.* in *Murray v. the Earl of Stair* (9), are not within the statute of Anne. In *Bonafous v. Rybot* (10), however, and in the cases of *Bridges v. Williamson* and *Darby v. Wilkins* (11), it was held that the defendant might bring the amount then due into court, although further sums would become payable under the conditions, and consequently the money brought in could not be "in full satisfaction" of the bond, nor could the defendant be "discharged from the same." But in the present case all the instalments have fallen due, and the balance, therefore, when ascertained, will be in full and final satisfaction, and the judgment mentioned in the 13th section may be given.

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The difficulty supposed to exist in this case, by reason of the doubt respecting the party entitled, is one more apparent than real. The Courts of Law, in modern times, are accustomed to recognise the equitable interests of parties, for whom the person named on the record may be suing. Here, however, the condition of the bond itself, though *Eales* is the sole obligee, and, therefore, necessarily the person appearing as plaintiff, discloses the facts of other parties being interested. The condition, already mentioned by us, was not simply to pay money to *Eales*. But, after reciting two assignments by him, it was to pay either him or one of two other persons, according as they should severally be entitled, under the circumstances, to the money. Payment to the plaintiff on the record, therefore, might be in effect no payment, for the purposes of this action; and, consequently, to determine what was due under such a bond, a further enquiry—beyond the mere question what payments had been made—became necessary, as to the party to whom they were made.

It was to meet that peculiarity in the case, that the third clause of the order was framed. And, as no inquiry has been made under that part of the order, the case must now be sent back to the Prothonotary, to complete the reference made to him. The costs of such reference, and of my order, and the inquiry under it, as well as the costs of this application, will be matter for consideration on the coming in of the report.

Order accordingly.

(9) 2 B. & C. 91. (10) 3 Burr. 1370. (11) 2 Str. 814, and 957.

PATERSON v. KNIGHT. (1)

1849.

July 18.

*New South Wales Port Act—3 Will. IV, No. 6, s. 18 and 7 Vic., No. 12, s. 12—
Anchorage of ship—Duty of Harbour Master—Liability of ship's captain.*

Stephen C.J.
Dickinson J.
and
Manning J.

The captain of a ship, not registered in Sydney, is not liable for damage done to another vessel by an anchor placed in the fairway, to which the ship has been moored by the direction of the Harbour Master, in the execution of his duty, under the Port Act.

THE facts and argument, in this case, appear in the judgment of the Court, which was delivered by—

THE CHIEF JUSTICE. This was an action on the case against the master of a vessel, for wrongfully placing her anchor, and keeping it so placed, in a shallow part of the port of Newcastle, in this Colony, in a position where persons navigating could not reasonably have expected it to be, and not placing or causing to be placed any buoy, or other mark, to denote the place of such anchor, by means whereof the plaintiff's steam vessel, while proceeding up the port, struck against the said anchor, and thereby sustained great injury.

The defendant pleaded the three pleas following:—1. Not guilty. 2. That at the time when &c., he had not the charge of the vessel. 3. That shortly before the said time, the vessel had been duly anchored in the port, but that he was desirous of removing her from the place of such anchorage to another place within the same port; and that he accordingly notified his desire to the Harbour Master of the port, who went on board the vessel and undertook and had the direction and exclusive management of her, for the purpose of such removal, in pursuance of the Port Regulation Act of this Colony. The plea then alleged, that the anchor was placed and kept placed, in the position and mode complained of, exclusively by the direction and under the authority of the said Harbour Master, in the discharge of his duty in that behalf; with a special traverse on the allegation, that *the defendant* placed or kept the said anchor in manner and form &c.,—concluding to the country.

Issue was joined in these pleas, and the cause was tried at the sittings in March last before Mr. Justice Manning. It appeared that the steam

(1) *The Sydney Morning Herald*, April 23, July 20, 1849.

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vessel did, in fact, strike against and was injured by the defendant's anchor, as complained of in the declaration, she being, at the time in her course, though not the usual course, up the harbour, and the presence of an anchor, in the place where it lay, not being suspected, in consequence of there being no buoy, as (according to the most of the witnesses) there ought to have been, to indicate its position. The whole question turned on the one point ; whose business it was, under the circumstances, to place that anchor—and, if necessary, the mark or buoy. The defendant's vessel, several days before the injury, had arrived at Newcastle and there been moored at a wharf, by the Harbour Master. At that wharf she lay securely, until the occurring of a gale of wind, the effect of which was, to make her drag one of two anchors, (by which, and a mooring chain or chains on shore, she had been kept in her original position,) and to bump heavily on the rocks alongside the wharf. The defendant thereupon applied to the Harbour Master, who repaired on board the vessel, and caused one of the anchors to be weighed, and taken across the channel, to the spot where the steam vessel afterwards came into collision with it. The defendant's vessel was then, under the Harbour Master's direction by heaving on this anchor, hauled off the rocks, and slightly from the wharf; and there again moored as before—her position, substantially, or *berth*, at the wharf, except as to the operation just described, remaining unchanged. The defendant was present at the removal of the anchor, but did not in any way interfere ; and it was effected by the Harbour Master's boat and men, assisted by some of the defendant's exclusively under the Harbour Master's orders. In like manner, the ship's crew hauled on the anchor, under the same direction. No buoy was put down, because, according to the Harbour Master, he did not think one necessary. Where a buoy is used, it is almost invariably attached to the anchor in the first instance, so that the anchor is let down with it. A buoy can be attached afterwards, but not without the aid of an expert diver. In either case, a knowledge of the depth of water is of course, essential. These were the material points of the evidence. There were several witnesses called, however, as to the general practice in various ports, where there is a Harbour Master, respecting the mooring and anchorage of vessels, but chiefly, the defendant relied on the enactments in the New South Wales Port Act—being the 3 Will. IV, s. 18, as amended by the 7 Vic., No. 12, s. 12. The admission of the evidence as to usage was objected to, by the plaintiff's counsel.

His Honor told the jury that on these facts their verdict should, in his opinion, be for the defendant. But to save expense, he requested them to answer certain questions which he then put to them, and to assess

damages for the plaintiff contingently, the defendant consenting that a verdict and judgment should be entered for them, in the plaintiff's favour, if the Court should think him under the circumstances entitled to recover. The facts found by the Jury, in answer to his Honor's questions, were the following:—That the anchor, in the place in which it was, without a buoy to denote its position, was dangerous to navigation; that it caused the injury complained of; and that the steamer, when she received it, was not out of her proper course; that the defendant was master of the vessel, to secure which the anchor was placed; but that he had not charge of her, for the purpose of so placing the anchor; that it was placed by the Harbour Master, in the manner stated in his evidence; and that a buoy ought to have been placed with it; but that according to maritime usage, the placing of the buoy was the duty of the Harbour Master.

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In the last term, the plaintiff moved that the verdict should be entered for him, pursuant to the leave reserved, or for a new trial. It was contended, that the Judge's direction was wrong, and that the questions mentioned ought not to have been put to the Jury. It was insisted that the finding, as to the Harbour Master's duty, with reference to maritime usage, was beyond their province, and the objection to the receipt of evidence, to show such usage, was renewed. As to the Port Regulation Act, it was argued that the Harbour Master's duty ceased, with the mooring of the vessel; that there was, in fact, no "*removal*" within the meaning of the section relied on; and that his placing of the anchor, when not necessary for that purpose, was therefore an intermeddling for which the defendant was responsible: that, at all events, the defendant was guilty of gross negligence, in allowing the anchor to remain without a buoy; which it was his duty to have placed, to prevent accidents from the anchor. The defendant, it was said, could not relieve himself from responsibility, unless the employing of the Harbour Master was compulsory on him, which it was not, in this matter. The question whether the defendant had charge of the vessel, for the purpose of shifting the position of the anchor was one of law, and not of fact; and the jury could not determine it. The act of the Harbour Master, under the circumstances, was the act of the defendant. The finding of the Jury was further objected to, in respect that they described the manner in which the anchor was placed, by reference merely to the Harbour Master's testimony.

The case was argued by Mr. *Broadhurst* and Mr. *Fisher* for the plaintiff, and the *Solicitor-General* and Mr. *Darvall* for the defendant; and the following cases and authorities were cited: *Bennett v. Morta* (2);

1849. *Lucey v. Ingram* (3); *Beilby v. Scott* (4); *Case of the Eden* (5); the
 PATERSON *Gipsy King* (6); *the Massachusetts* (7); *Taylor v. Clay* (8); and *M'Intosh*
 v. *Slade* (9).
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Stephen C.J. We have fully considered this case, and, on the whole, we are all agreed in opinion, that the direction and verdict were right. The defendant's vessel was one not registered in Sydney, or employed in the coasting trade, and, therefore, was of the description of vessel governed by the Port Act, s. 18. That section enacts, that whenever any such vessel arrives in any port or harbour, the Harbour Master shall repair on board of her, and appoint the place where she shall cast anchor, and, whenever the Master shall desire to remove the vessel from one place of mooring or anchorage to another, he shall notify his desire to the Harbour Master, who shall go on board of the vessel, and (unless he shall see reason to the contrary) shall direct the removal thereof; and for every such service, such Harbour Master shall be entitled to receive the fees set forth in a schedule. Now, at first sight, from the wording of this enactment, it would appear that the duties of the Harbour Master were, only to *appoint* the place of anchorage and *direct* the removal of a vessel, leaving it to the Master, thereupon, to carry out the operation on his own responsibility. But, having reference to the schedule incorporated with the section, and to the reason of the thing, we are of opinion that the entire duty is cast on the Harbour Master. He is to receive fees for repairing on board, and appointing the place of anchorage, or for the removal of the vessel consistently with these terms, it cannot be that he is only to appoint the place to which the vessel is to be removed:— he is to be paid for a service which is described as being *the removal* of the vessel.

The objects of the Act, and the nature of the service to be performed, are then to be considered. The objects are the preservation of the harbours from injury, and the regulation of the shipping generally within them. But the proper place for an anchor, and the question whether a buoy is necessary or not, having regard to the safety of navigation in the harbour, will depend on the depth of the water, and other considerations, with which it is the Harbour Master's peculiar province to be acquainted. And since, as the evidence at the trial showed, the buoy is ordinarily attached to the anchor in the first instance, where it is attached at all, and a stranger has not (or may not have) the means of knowing when a

(3) 6 M. & W. 315. (4) 7 M. & W. 93. (5) 10 Jur. 296. (6) 11 Jur. 357.
 and 2 W. Rob. Ad. 537. (7) 1 W. Rob. Ad. 373. (8) 11 Jur. 277. (9) 6 B.
 & C. 657.

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buoy is required, the duty of causing one to be so attached would seem, almost conclusively, to be incident to that of directing the anchorage, or the removal, of the vessel. If, however, to direct the removal of a vessel be, practically, to superintend and carry out such removal, we may reasonably hold that to appoint the place of anchorage (the duties being precisely of the same nature), is in effect to superintend, in like manner, all things connected with such anchorage. We need not determine that point, however, as we think that, on a fair construction of the enactment, the duty performed here was that of *removing* the vessel. It appears that she had drifted (though slightly) on to some rocks, and that the defendant, for that reason, was desirous of removing her. But, had he done so, leaving thereby his appointed place of anchorage, he would have rendered the Harbour Master's discharge of duty, in that respect, perfectly useless. It would be absurd to suppose that the Harbour Master may direct the place of anchorage, but that the Master of the vessel may then quit it. The Harbour Master's duty was plainly meant to be, to control and regulate all such matters for the general benefit; and the defendant's interference with it, would therefore have impeded him in the proper performance of that duty. The defendant, however, complying with the enactment, notifies his desire of removal to the Harbour Master, who accordingly does remove her. It is quite true, that the removal was a slight one, but it was sufficient for the purpose. The vessel was removed from her then dangerous position to the spot (or nearly to the spot) she had previously occupied. And we are of opinion that, as this was effected under the immediate direction of the Harbour Master, and the placing of the anchor, to which the placing of a buoy, when necessary, is incident, was the mode by which such removal was effected, the act or omission complained of was that of the Harbour Master, and not the defendant, and, consequently, that this action is not maintainable.

The judgment which we have thus expressed renders it unnecessary to consider the other points in the case. The duty of the Harbour Master, in respect of placing a buoy, in general, may or may not be affected by maritime usage, and the question, in this case, may not be in any degree dependent on usage. We have dealt with it as a mere question of law, on the evidence reported to us as to the fact of the removal, and its circumstances, irrespective of any usage; and have considered the verdict, therefore, simply in connection with the Judge's direction, independently of the special finding of the Jury, on the questions put to them.

Verdict entered for defendant.

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DOE *dem.* LONG v. DELANEY. (1)

July 2.

Stephen C.J.
Dickinson J.
and
Manning J.

Imprisonment for debt—10 Vic., No. 7, s. 3—"Judgment"—Consent rule for payment of costs.

Defendant having entered into a consent rule for payment of costs to the plaintiff, a writ of *ca. sa.* was afterwards obtained thereon by the plaintiff, and the defendant imprisoned.

Held (*per* the Chief Justice and Manning J.), the plaintiff was a judgment creditor within the meaning of sec. 3, 10 Vic., No. 7, on the consent rule; (*per* Dickinson, J. *dissentientem*) the word "judgment" was not applicable to the consent rule, since the Act should be construed strictly.

THIS was an action of ejectment, commenced in the ordinary way against *Richard Roe*. Afterwards, the defendants, by a consent rule, consented that if the plaintiff could not prosecute his suit, because of their not confessing lease, entry, and ouster, then they undertook to pay the plaintiff's costs, to be taxed. The plaintiff was non-suited at the trial, the defendant refusing to confess as agreed. An order was then obtained by the plaintiff for the issue of a writ of *ca. sa.*, for his costs, under 10 Vic., No. 7, s. 3. Under this writ the defendant, *Margaret Delaney*, was taken in execution.

The *Solicitor-General* and *Lowe* now moved to set aside the order for the issue of the writ of *ca. sa.*, and all subsequent proceedings thereon. They contended that the Act, being in restraint of the liberty of the subject, must be construed strictly, that the plaintiff had never obtained a "judgment" against the defendant. The consent rule was not an absolute order for the payment of money.

Fisher contra.

THE CHIEF JUSTICE said, as to the last point taken, the case *Doe dem. Pennington v. Barrett* (2), was a decisive authority against it, and therefore he would say no more as to this point. The only point now, therefore, was whether the plaintiff, as against the defendant, *Margaret Delaney*, was a judgment creditor, or had a judgment against her. The opinion he now entertained was similar to that he had formed when the case came before him in Chambers. He was of opinion then that the plaintiff was a judgment creditor against the defendant on the consent

(1) *The Sydney Morning Herald*, July 3, 1849. (2) 16 L.J., Q.B. 296.

rule, that it was in effect a judgment, and that he was consequently right in issuing a *ca. sa.* upon it under the 3rd section of the 10 Victoria, No. 7. The opinion he had formed when the case was in Chambers was not free from doubts, and the arguments of to-day had rather increased than lessened them. Looking at this Act, and the other it meant to simplify, it was manifest the framer of the latest in date was aware of the distinction between judgments, in the common acceptation of the word, and decrees and orders of the Court, but still used in the latter Act, the words "judgment" and "judgment creditor," for brevity sake, to include both kinds.

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DICKINSON, J., said he regretted he could not concur in the judgment of the rest of the Court. He had arrived at a different conclusion. It was not for him, in construing the Act, to conjecture what might be or not be the intention of the Legislature in drawing the Act. If he might do so perhaps he might imagine that the Legislature intended the Act to include such a case as this. It was for him to construe the words of the Legislature as he found them, by certain well-known, well-defined, artificial rules. He would construe the Act in question strictly, and would give to certain words their well-known meaning. He therefore would hold that the words "judgment creditor" was not applicable to the plaintiff nor the word "judgment" to the consent rule. It was evident these words in the Act were not used in the mere conventional sense sometimes expressed, but were used in contradistinction to the words, orders, and decrees, &c. He therefore considered that a judgment obtained by a plaintiff against a defendant was only to come within the force of the clause in question, and its operation could not be extended to the case of a defendant obtaining a judgment against a plaintiff.

MANNING, J., delivered a judgment in accordance with that expressed by His Honor the *Chief Justice*.

Application refused.

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[IN CHAMBERS.]

Aug. 27.

Stephen C.J.

BANK OF AUSTRALASIA v. WALKER. (1)

Jury Act—11 Vic., No. 20, s. 33—Costs of special jury.

A plaintiff, who has discontinued, is liable for the costs of a Special Jury, paid by the defendant, and also for the defendant's costs of obtaining the order for the same.

In this matter, heard in Chambers before the *Chief Justice*, judgment was delivered on August 27th.

The CHIEF JUSTICE. The judgment in this case decides the question of liability of a plaintiff to the costs of a Special Jury, the order for which was obtained by the defendant.

The defendant obtained an Order in this case for a Special Jury, and thereupon paid £6 jury fees to the Prothonotary. Afterwards the plaintiff, without going to trial, discontinued his action; and the question is whether the defendant is entitled to have the £6, and the costs of the said Order, taxed to him as costs in the cause, under section 32 of the Jury Act. The Prothonotary having declined to allow them unless directed by a Judge, the question comes before me on an application to review his taxation.

Mr. *Broadhurst* for the plaintiff, relied on the cases in 10 *B. and C.*, 701 (2), and in 2 Dowling, P.C., 518 (3), and 9 Dowling, P.C., 51 (4); and on the provisions in section 33 of the Jury Act, Mr. *Fisher* for the defendant, on the other hand, argued that those were not applicable, as in England no costs for a Special Jury are paid, unless there be a trial, whereas here, the parties pay either on taking out the *Order*, or on setting the cause down for trial. Further, he contended that section 33 did not apply, in terms, to any case where there was not a trial, and relied on the decision of the Judges in *Yabsley v. Buckland* (5), (26th May, 1847), to show that where a certificate could not possibly be either given or refused, there the enactment requiring a certificate was not in force.

I have looked into the cases cited, and conferred with Mr. Justice *Manning* on this question, and we are of opinion with the defendant, for the reasons urged by his Counsel. I therefore direct the Prothonotary to allow the costs in question.

(1) *The Sydney Morning Herald*, August 28th, 1849. (2) *Wood v. Grimwood*.
(3) *Bell v. Tainthorp*. (4) *Morgan v. Miller*. (5) No reliable report.

DOE *dem.* WILSON *v.* TERRY. (1)

21 Jac. I, c. 14—3 & 4 Will. IV, c. 27—*Possession to oust the Crown—Information of intrusion—Sixty years' adverse possession.* 1849.
Oct. 4.

If the statute 21 Jac. I, c. 14, is in force in the Colony, its effect is not, where the lands of the Crown are the subject of an intrusion, to put the Crown out of possession, but, having more than a bare right of entry, notwithstanding the intrusion be of 20 years' duration, the Crown can convey those lands effectually by grant, without having recourse to an Information of Intrusion (but, *semble*, the statute is not in force). Stephen C.J.
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The Crown is not included in the meaning of the word "person" in 3 & 4 Will. IV, c. 27. The right of the Crown can only be barred by sixty years' adverse possession.

NEW TRIAL MOTION.

The judgment of the Court was delivered by—

The CHIEF JUSTICE. This case having again gone down to trial, in consequence of our decision at the close of last year, on the points then raised, the defendant on this occasion set up as a defence, under the 21 Jac. I, c. 14, a possession in various parties, prior to the date of the Crown Grant, for about 20 years. That date was the 14th February, 1835; and the death of *Ambrose William Wilson*, the co-grantee with the lessor of the plaintiff, after that date, and before the date of the demise laid in the declaration, was proved. The evidence relied on by the defendant was the following:—One witness said that he knew the property in 1813, when there were two cottages on it, one of which was occupied by a Government storekeeper as his private residence. Other witnesses proved, that one *Josephs* lived on the property in 1818; that, before Christmas, 1834, work was done to some old houses on it, by the orders of Mr. *Samuel Terry*, and that the latter soon afterwards pulled them down, and laid the foundation of new ones on the site. It was also stated that from 1812 or 1813 up to 1835, the premises were always occupied. No title in *Samuel Terry* was shown, otherwise than by the above mentioned acts of ownership, and no privity or connection was attempted to be shown between him and the former occupiers, or any of them, or between him and the present defendant. It was contended, however, that the facts established a possession adverse to the

(1) *The Sydney Morning Herald*, Oct. 6, 1849, and 2 S.C.R. App. 1. Cited 11 N.S.W.L.R., 357; 12 N.S.W.L.R., 123.

1849. Crown, for the period mentioned ; and that, under the statute of James,
 as that period exceeded twenty years, the Grant was invalid for want of
 a previous adjudication of title in the Crown.

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Mr. Justice *Dickinson* told the Jury that, supposing the statute to be in force in this Colony, its effect was not to put the Crown out of possession ; and that the Crown, having more than a bare right of entry, could, notwithstanding an intrusion on its lands for twenty years, convey those lands effectually by grant, describing them, without other or more express words. His Honor said that the evidence of possession, in this case, was *some* evidence to show a seizin in fee in the individuals occupying, but that, on the other hand, the issuing of the grant in 1835 was an act of ownership, tending to show seizin at that time in the Crown. And referring to the decision of this Court in *Hatfield v. Alford*, in the year 1846, he directed the Jury to find for the plaintiff, unless they thought that the evidence for the defendant established a title in those parties, or some one claiming under them by a grant from the Crown prior to that of 1835. His Honor said that if the Crown could, when it issued that grant, have successfully maintained an Information of Intrusion, its grantee was entitled to recover in this ejectment.

The Jury having found for the plaintiff, a new trial was moved for in April last, on the ground of misdirection, and that the verdict was against the evidence. The case was argued by the *Solicitor-General*, Mr. *Donnelly*, and Mr. *Fisher* for the defendant, and by Mr. *Broadhurst* and Mr. *Lowe* for the plaintiff. It was contended by the latter, that the 21 Jac. I, c. 14, did not extend to New South Wales, to the circumstances of which such a provision was wholly inapplicable. By the ordinary rules of law, they said, it clearly would not extend here ; and the enactment in the 9 Geo. IV, c. 83, s. 24, notwithstanding the term "*applied*" there used, could not reasonably be construed as introducing any and every statute, physically susceptible of application, without regard to its unfitness and inapplicability, or utter unsuitableness to our condition and circumstances. But, if in force, they maintained that the effect of 21 Jac. I was, merely, in the cases to which it applied, to put the Crown to the proof of its title ; which, in this action, *was* proved. They submitted, however, that there was not any evidence at the trial of a possession adverse to the Crown, without which, no question on the statute would arise. On the other hand, it was contended, for the defendant, that the 21 Jac. I takes away all right of entry from the Crown where it has been twenty years out of possession ; and that, if the Crown could not enter on the land in such cases, and summarily

eject the intruder, it could not enable an individual to enter by the evasion of issuing a grant. The learned counsel said that a right of entry could not be assigned, and that a right of action, if assignable, could only be assigned by express words. They maintained, that after a loss of possession for twenty years, an Information of Intrusion was indispensable, or an Inquest of Office. They submitted that, independently of the provision in the 21 Jac. I, the Statute of Limitations, 3 & 4 Will. IV, c. 27, s. 2, prevented the plaintiff here from recovering. Finally they urged that the possession in this case, as no such point was made at the trial, must be taken here to have been adverse, or, if not, that a new trial should be granted to determine that question.

The cases and authorities cited were the following:—*Doe v. Morris* (2); *Magdalen College Case* (3); *Vin. Ab. Prerogative of the King*, M. b. and G. b. 3; *Miles v. Williams* (4); *Travell v. Carteret* (5); *Ch. Prerog.* 399; *Bac. Ab. Prerogative*, E. 3 and 5, and F. 3; *Crocker v. Dormer* (6); *Doe v. Redfern* (7); *Doe v. Roberts* (8); *Anonymous* (9); *Com. Dig. Prerogative*, D. 71; *Attorney General v. Stewart* (10); *Cromer's case* (11); *Staun. Prerog.* 54; 4 *Inst.* 116; *The Queen v. Braybrookes* (12); *Northampton v. St. John* (13); *Lord Pagel's Case* (14); *Attorney-General v. Parsons* (15); and *Hatfield v. Alford* in this Court, 1846 (16). The Statutes 8 *Hen. VI*, cap. 16, and 18 *Hen. VI*, caps. 1 and 6, were also referred to.

We took time to consider of our judgment, and also to examine the Colonial Act of Van Diemen's Land, declaring the non-applicability of the Statute of James to that colony (passed in consequence of a difference of opinion between the then two Judges of the Supreme Court there, on that question), and to procure a copy of an opinion, which we were informed had been given by the Attorney and Solicitor-General of England, in reference to which that Act was disallowed by the Queen. We have been favoured with a perusal of that opinion, bearing date the 1st November, 1842; and we have looked into the cases and authorities, which were cited on the argument before us, and the result at which we have arrived is, that the direction by Mr. Justice *Dickinson* to the Jury was right, and that there ought to be no new trial.

The 21 Jac. I, cap. 14, on which the main question in this case depends, is thus intituled, "An Act to Admit the Subject to plead the

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(2) 2 Bing. N.C. 189. (3) 11 Rep. 70 a. (4) 1 P. Wms. 252. (5) Levinz 135. (6) Popham 26. (7) 12 East 96. (8) 13 M. & W. 520. (9) 3 Leonard 198. (10) 2 Meriv. 159. (11) Cited in 3 Rep. 4. (12) 1 Leonard 271. (13) 2 Leonard 56. (14) 1 Leonard 202. (15) 2 M. & W. 25. (16) *Ante*, p. 330.

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general Issue, in Informations of Intrusion brought on behalf of the King's Majesty, and retain possession until trial." It recites, that the King may by his prerogative "enforce the subject, in Informations of Intrusion brought against him, to a special pleading of his title. It then enacts, that, whenever the King shall have been out of possession for twenty years, or shall not have taken the profits of the land within that space, "before any Information of Intrusion brought to recover the same," the defendant in every such case may plead the General Issue, and shall not be pressed to plead specially—"and that, in such cases, the defendant or defendants shall retain the possession he or they had at the time of such information exhibited, until the title be tried, found, or adjudged for the King." There is only one other clause in the Act, which provides that, where an Information of Intrusion may fitly be brought for the King, no *Scire Facias* shall be brought whereunto the subject shall be forced to a special pleading, and be deprived of the grace intended by this Act.

It is insisted that the effect of that statute is, supposing it to be in force in these colonies, to prevent the Crown from granting any of the waste lands, of which it shall not have had the possession, or received the profits, for twenty years; and to compel it, as a preliminary step, to proceed against the intruder or intruders by information or other prerogative remedy. We are quite clear that no such effect is attributable to the statute. Of the mischievous consequences, the extensive and serious evils, which would inevitably follow from such a construction, we need say nothing. The circumstances of newly-discovered and unpeopled territories, claimed by and vested in the Crown, on behalf of all its subjects, are so widely different from those of a populated and long-settled country, in which the lands never practically belonged to the Crown, and (with the exception of a few tracts and scattered properties, often acquired by the Sovereign originally by purchase) have for centuries been owned and cultivated by its subjects, that a moment's reflection would present them to the mind even of a stranger. The lands in new territories are unoccupied and waste, until granted by the Crown to some individual, willing to reclaim them from a state of nature. The Crown derives no "profits" from them, and could in the literal sense no more "possess" them than it could the animals which roam, unmolested, over the vast area which they embrace. In England, as we observed in the case of the *Attorney-General v. Brown* (17), the title of the Sovereign to land is a fiction; or, where the Crown

really owns land, the property is enjoyed as that of a subject is, and by a title which admits of proof by documentary and other evidence. Here, the title of the Crown as universal occupant is a reality, and there is no proof of it required, or admissible. The acquisition of the country, and its settlement by British subjects, are matters of judicial cognizance. In such a territory it will unavoidably happen that many spots of ground may be occupied for a series of years without the knowledge of the Crown or its officers; or, if by their knowledge, without the means (or, frequently, the wish) to disturb the parties. In many instances the Crown has given land for fourteen or twenty-one years, meaning eventually to grant it in fee. If in all such cases of derelict possession, where extending over twenty years, the Crown is to be put to its Information of Intrusion, and grants of such lands, issued or to be issued, are and will be invalid, because of no previous adjudication of its title, in such a proceeding, the inconveniences and evils to the public will be enormous.

But why, either here or in England, should such a construction be given to the statute? What benefit would the intruder on the Crown gain, as a defendant at the suit of the Crown, that he would not equally possess as a defendant in an ejectment? None that we can discover. Why, then, the Crown should not grant the derelict land, leaving it to the grantee, at his own risk and cost, to prosecute and prove at once the Crown's claim and his own, it would be impossible to say. But, if no ground or reason for the enactment supposed can be suggested, the Court will assuredly not strain the words to meet an imaginary evil. The object and the occasion of the Act are stated, and the former will be fully attained in every conceivable case, without the restriction contended for. Before the passing of that Act, the Crown could compel the defendant, in an Information of Intrusion, in all cases, to set out his title specially on the record. The defendant could not rely on his possession, as he might and does in an ejectment; but, on failure of showing title, he was liable to immediate eviction, for the King's title, it was held, being in all cases easily ascertainable, and ordinarily depending on matter of record, sufficiently appeared by the Information itself. *Vin. Ab. Prerog. F. c. 2*; *4 Inst.* 116. This, in any case, perhaps, but certainly in cases where the Crown had been out of possession many years, was a serious evil. In these Colonies, indeed, from the circumstances already explained, a defendant would experience no difficulty. No man here has a title, except by grant direct from the Crown, and, if such a grant has been issued, the assertion and proof of it would alike be easy. But, in England, the difficulty of setting out and establishing

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a title, against that of the Crown, through perhaps a long series of years, would be obviously of a very different nature. The 21 Jac. I, enacted, therefore, in substance, that, after twenty years' possession, the defendant need not set out any such title, but might simply plead not guilty, and retain possession until the trial. Such, we say, *substantially*, is the enactment. We have elsewhere given the exact words. Every portion of the Act, the particular language of both clauses, of the recital, and the intituling, shows that the sole evil in contemplation of the Legislature was the one stated—that of a defendant, when sued by Information of Intrusion, being compelled to show a title on the record, instead of being able to put the Crown to prove its own. The remedy, accordingly, is co-extensive with that evil. By holding that the enactment goes farther, and not only shifts the burthen of proof, in Informations of Intrusion, but restricts the Crown's remedy to Informations of Intrusion, or (which would be the same thing) that it enables the intruder to retain possession, until such an Information shall have been brought and disposed of, we should not advance the remedy for the evil one step.

We should simply, according to our view of the matter, create an additional provision, without one intelligible motive or occasion for it. Accordingly to the second section, the grace intended was—that the subject should not be forced to special pleading; and therefore, a *Scire Facias* was prohibited in such cases. But the prohibition of a grant, and the proceedings by the grantee in his own name, would have been idle, for the grace intended (or, in other words, the remedy) would be as effectual in that event as in the other. The evil was, the putting of defendants sued by the Crown, to special pleading. Where the Crown does *not* sue, the statute has no application. Independently of the argument arising from the second section, and from the intituling of the Act, and the recital, the continual reference to Informations of Intrusion, throughout, and to the pleading therein, as the subjects under legislation, and the use of the words *in such cases*, in the first section, appear to us to be inconsistent with any other conclusion. But, it was urged, following the argument for the defendant in *Doe v. Morris* (18), the Crown had no other or greater right, than to file an Information of Intrusion; and, therefore, it could convey no other or greater right. If by this was meant, only, that the Crown had nothing more than a *right of entry*, the position might perhaps be conceded, without affecting the opinion which we have expressed, either as to the power of

the Crown to issue a Grant, or the title of the lessor of the plaintiff under this particular Grant. Without power in the grantee to sue, the Grant itself would be idle, and, therefore, to give it any effect, the right of entry must be taken to have been granted also. The only case cited, to show that a right of entry cannot be assigned, is that in 3 *Leon.* 198, quoted in *Doe v. Morris* as 128; and there the opinion attributed to *Gawdy*, Justice (if it be his, which is not very clear, and supposing it bear out the position) was clearly extrajudicial. And *Tindal* C. J., in *Doe v. Morris*, appears not to recognise that position as law, for in considering whether the Commissioner's Certificate, being in effect a conveyance of the land in dispute, was equivalent to a Grant or conveyance from the Crown, he expressly admits the prerogative to assign a *chose in action*, but takes no notice of the objection raised that the Crown could not assign a right of entry. And, in *Vin. Ab. Prerog.* G. b, 3, the law is said to be that the King can grant a right of entry, provided he do so by special words. (See also the same title, 1 c.) A right of entry, after all, is a species of chose in action, the latter term being more usually applied only to actions personal, as the former is to a chose in action real. As to the absence of express words, the cases cited on that head have little or no application. They are either cases in which (as in 3 *Leon.*) the grantee claimed to avail himself of the Crown's prerogative, or in which the question was, whether a particular thing or right (the presentation to a benefice, for instance, or the right to bring a writ of error, or to sue on a bond due to a felon) passed under such general words, as "all rights arising" in a certain manor, or "all the goods and chattels" of certain felons. These are the cases quoted from *Leonard*, and the instances in *Vin. Ab. Prerogative*, C c, D c, and E c, are all of the same character. In *Cromer's case* (19) the question was whether a bare right, vested in an attainted person, to certain land of which he had been disseized, passed under a general grant from the Queen, of all the lands, rights, and hereditaments, which he had by the attainder. But there, as was observed by Mr. Justice *Dickinson* in *Hatfield v. Alford* (20), the Crown had never been in possession. The grant, too, was after the disseizee's death. It might, therefore—the question being one depending on *intention*—not unreasonably have been doubted, whether the Queen meant to convey any such mere naked right. But where, as here, the right or thing in action is essential to the acquisition of the thing granted, the law clearly seems otherwise. Thus, the Crown having granted to a woman certain obligations due to a person attainted, it was

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(19) Cited in 3 Rep. 4. (20) *Ante*, p. 330.

1849. held that she could sue on these in her own name, although there were

DOE no express words enabling her. For, says the report, "the law implies
dem. that the grantee shall use the means to come at the thing granted."
WILSON *Vin. Ab Prerog.* M b, 9. That is a strong instance of the well-known
v. principle, as to grants by necessary implication, for, there, the grantee
TERRY. claimed and exercised a prerogative right. Without it, however, the
Stephen C.J. choses in action granted her would have been unavailable. "When
anything is granted, all the means to attain it, and the fruits and
effects of it, are granted also, and shall pass inclusively together with
the thing, by the grant of the thing itself." *Shep. Touch.* 89, *Broom's*
Max. 198. It would be inconsistent with this to hold that nevertheless
in the present case express words were necessary to enable the grantee
of Crown land, of which the Crown, at the time, presumably, knew
itself to be not in actual possession, to bring an ejectment in his own
name to recover it. If that right were not granted, what in effect *was*
granted?

But we are of opinion that the Crown here had more than a mere
right of entry. If it had not, an Information of Intrusion, which, it
was contended, was the appropriate remedy, would not have been main-
tainable. An Information of Intrusion is, in its nature, essentially an
action of trespass, and, therefore, is founded on *possession*. The actual
occupation may be, in fact, in some intruder, but the wrongful entry and
occupation of a Subject cannot, in legal contemplation, divest the Sovereign
of possession. The Crown sues, therefore, in this prerogative action, at
any time within sixty years, on a possession implied by law; the defendant,
if found guilty, is fineable for his intrusion, as in trespass, and if any
damage have been done by him, damages are recoverable. *Ch. Prer.* 332,
and 34; *Vin Ab, Prerog. F. e. and H. e.* 3; *Com. Dig. Prerog. D.* 77;
and *Attorney-General v. Brown* (21), in this Court in February, 1847.

The case of *Doe v. Morris* (22), as it appears to us, does not conflict with
the views here expressed; but if, as to effect of the statute 21 Jac. I. c.
14, it be inconsistent with them, we think that it is overruled by the
case relied on for the plaintiff of the *Attorney-General v. Parsons* (23).
The question in *Doe v. Morris* turned, mainly, on a particular clause in
the 57 Geo. III, c 97. That Act empowered the Commissioners of Woods
and Forests, on the sale of any manors or lands of the Crown, to convey
them by a certificate, under which the purchaser was to be deemed in
actual possession of the property, and to hold the same "as fully and
amply" as the Sovereign might have done. The property in question

(21) *Ante*, p. 312. (22) 2 Bing. N.C. 189. (23) 2 M. & W. 25.

was certain land, part of a manor, which had been occupied for above twenty years by the defendant, or those under whom he claimed. And the Court held that, as the Crown could not have obtained or held the land without a recovery in Intrusion, the *Commissioners* could not enable a purchaser to obtain or hold it, without such recovery. Lord C. J. *Tindal* said, that the 57 Geo. III, gave the Commissioners no power to sell any land so circumstanced, and that, if it did, the power had not in fact been exercised by them, as such land would not pass under the word Manor only. On a superficial reading, the conclusion may perhaps be drawn that the Court thought an Information of Intrusion necessary in cases of that kind, in any event. But it will be seen, from the context, that their judgment decides merely this, that the *Crown* could not turn out the intruders, except by Information in Intrusion, and that, for that reason, the Commissioners could not convey the land intruded on, since purchasers were only to hold as fully as the King could have held. The distinction between conveyances by the Crown and by Commissioners acting under limited powers is expressly drawn; and the power of the Crown, by its prerogative, "to assign a right of action, or a chose in action," is clearly recognised. The Court of Common Pleas did not, therefore, we apprehend, give the words in the 21 Jac. I, c. 14 s. 1, any such construction as that contended for, namely, that an intruder on the Crown land, after twenty years, may retain possession (under all circumstances) until after the termination of some Crown suit brought against him. The Court of Exchequer, at any rate, in the *Attorney-General v. Parsons* (23), have declared that such is *not* the meaning of the enactment. When the statute provides that the title is to be found, and that the defendant may retain possession until trial, "it means only" (says Lord *Abinger*) "that the onus is thrown on the Crown to prove its title in the first instance. The defendant shall not be bound to plead his title specially where he has had twenty years' possession." And Baron *Alderson* adds, "where the defendant pleads not guilty, or *non intrusit*, though the Crown prove the intrusion, he is entitled to retain possession until the Crown also proves title." Nor is it immaterial to observe, that, if the recognised construction of the statute were otherwise, the course taken for the defence in *Doe v. Roberts* (24); which was an ejectment founded, as this is, on a title from the Crown, would be unintelligible. The real plaintiff there claimed under a Crown lease dated a few years previously, and the defendants endeavoured to displace the title of the Crown, by showing a continuous possession in themselves and those under whom they claimed, for sixty years and upwards. But, if

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(23) 2 M. & W. 25. (24) 13 M. & W. 520.

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twenty years of such possession would, as contended for here, have been sufficient to put the Crown to its Information of Intrusion, one cannot understand why a defence, so much more easily established, was not resorted to.

The opinions thus expressed, as to the effect of the 21 Jac. I, c. 14, render a disposal of the question respecting its application to these Colonies unnecessary. For reasons which will readily be collected from this judgment, resting on the peculiar circumstances of a recently occupied territory, to the whole of which the title was in the Crown, within a period little exceeding sixty years, and in which the title of every individual rests on some Grant from the Crown, we are strongly inclined to the opinion that the statute is not in force here. But, if it be in force, and if its effect be that for which the counsel for the defendant contended, the only possession which will affect the Crown under the Act, as they admitted, is one adverse to the Crown; and of this, we do not think that there was any evidence. Nor can we infer that the jury found such a possession, because, as they negatived *title* in the defendant, of which, in the absence of explanatory circumstances, possession is evidence, we must either conclude that the occupation and acts of seeming ownership were mere trespasses, unacquiesced in by the Crown, and not made under any claim of right, or that they were severally with the knowledge and by the permission of the Crown. In either case, according to the decision in *Doe v. Roberts* (24), there was no adverse possession.

With respect to the argument, that this action is barred by the 3 and 4 Will. IV, c. 27, s. 2, the same objection was raised and disposed of in *Hatfield v. Alford* (25). By that section, no person shall make an entry or distress, or bring an action to recover land, except within twenty years next after the right to bring it, or to make an entry or distress, shall have first accrued to him, or to some person through whom he claims. By s. 3, that right shall be deemed to have so accrued, at the time when such person, having been in possession of the land, or in receipt of the profits of it, shall have discontinued such possession or receipt. And, in s. 1, there is an enumeration of the several classes of individuals, to whom the word "person" shall extend. The first question is, therefore, whether the Crown be a *person*, within the meaning of that first section; and secondly, if so, whether the intrusion on the Crown relied on show a discontinuance of possession, within the meaning of the third section. Now it is settled law (26), that the possession

(24) 13 M. & W. 520. (25) *ante*, p. 330. (26) See *Doe d. Corbyn v. Bramston*, 3 A. & E. 63; *Nepean v Doe*, 2 M. & W. 894; and *Culley v. Doe*, 3 Per. & Dav. 539.

contemplated by this Act, except in cases under s. 15, is an actual or bare possession merely. In other words, any possession for twenty years, whether adverse or not, (other than, of course, a possession by a tenant, or a person acknowledging himself to have no title) is effectual. So that, if the first question be decided in the affirmative, the consequences may be fatal in this colony to very many titles. We adhere, however, to the opinion expressed by this Court in the case cited, that the word "person" does not include the Crown. If it does, the Queen (supposing the Crown to be itself able to sue) cannot, even by express words, enable her grantee to enforce possession, after twenty years, although herself not barred for sixty years. But, secondly, if the word person includes the Crown, in cases where it is claimed under the word must include the Crown where it is the party claiming:—and then the enactment amounts to this, that the *Crown* cannot make an entry or distress, or bring an action to recover land, except within twenty years. In each of these respects, the prerogative would be affected and impaired without express words, and, in the latter, a new statute of limitations be introduced, without any thing denoting an intention to repeal the statute, which fixes the period at sixty years. Under that statute, too, the possession relied on against the Crown must be, (as we apprehend is also the case under the statute of 21 Jac I, c. 14) an *adverse* possession. That statute of James, therefore, which clearly contemplates suits by the Crown after twenty years, would in effect equally be repealed. Or, if the Crown be not barred by twenty years, this objection then remains, that although its grantee cannot directly sue, he may indirectly do so by inducing the Crown to sue for him, which would defeat the enactment altogether. The case is reduced, therefore, to this absurdity, that either the word person means the Crown in one part of a sentence, and does not in the other, and, if this be the true construction, then the enactment may, in cases of this kind, be easily rendered a dead letter, or, if the word includes the Crown throughout, then the Crown is barred by a mere possession, of any kind, for twenty years, instead of, as is clearly taken to be the law in *Doe v. Roberts* (27), by an adverse possession of not less than sixty. Independently of these considerations, we think that the reason of the thing, and the whole scope and tenor of the three sections, as well as the description of the parties given in the first section, who are included in the word person, all strongly show that the Crown is not so included.

The case has been argued with much ability and learning, but, after full consideration, we are of opinion that our judgment, on all the points, must be for the plaintiff.

New trial refused.

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Oct. 5.

Nor. 7.

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and
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*Libel—Pleading—11 Vic., No. 13, s. 4—27 Eliz., c. 5—12 Vic. No. 1, s. 6—
Demurrer—Duplicity—Uncertainty.*

A plea to a declaration in libel averred the truth of the facts, the correctness of the report of the police court proceedings, on which the action was founded, and a justification, as being published for the public benefit.

On objections by way of demurrer that no facts were alleged showing that the publication was for the public benefit, that the particular facts alleged did not support that averment, and that certain alleged mistaken views to be corrected by the said report were absurd, *held*, notwithstanding 27 Eliz., c. 5, that these were objections in substance and excluded from consideration by 12 Vic., No. 1, s. 6.

A plea is not bad for duplicity because it contains other matters, which, by sec. 4 of 11 Vic., No. 13, are required to be joined to the averment of the truth of the libel.

An averment in a plea that certain money had been stolen is not bad for uncertainty if set out with as much certainty as in an indictment for larceny.

In this case, which came before the Court on demurrer on October 5, judgment was reserved, and on November 7 delivered by

The CHIEF JUSTICE. The declaration in this case stated that the defendants published in a newspaper called the *Sydney Morning Herald* a malicious libel, containing the defamatory matter following concerning the plaintiff:—

STEALING MONEY.—Yesterday John Terry Hughes and Henry Hughes (meaning the plaintiff), on bail, appeared before Alderman Egan and Dr. Mitchell, at the police office, to answer a charge of stealing, preferred against them by one Donald Beatson. Inspector Higgins deposed that he apprehended the prisoners on Monday afternoon, by virtue of a warrant produced, in which they were charged with stealing. There was another individual named in the warrant, who had not yet been taken, although he had been at his residence in search of him. The further hearing of the case postponed until Friday, in order to have the third party before the Court; and the recognisances of the prisoners were enlarged until that day. Later in the day, Mr. Higgins apprehended John Kinnear, the person in consequence of whose absence their Worships adjourned the case. We learn that Beatson, the prosecutor, went on the evening of the 28th instant to Chambers public-house, in Pitt-street, by appointment, to pay Henry Hughes (meaning the plaintiff) a sum of money, his moiety of the proceeds of cattle, taken by Beatson to South Australia, and sold on account of the prisoner H. Hughes and Esther, the wife of John Terry Hughes; that he there found John Terry Hughes, Henry Hughes, and John Kinnear; that he counted down on a table the sum of £282 13s. 6d. in notes and silver, having previously paid Esther Hughes her moiety;

(1) *The Sydney Morning Herald*, Oct. 8, Nov. 9, 1849.

that he (*Beatson*) left the room for the purpose of calling *Chambers* to witness the signing of the receipt ; and that, on his return to the said room, the money had been taken up from the table, when neither of the persons named would acknowledge having received any money from him. The next day he gave information to the police, and a warrant was granted for the apprehension of the individuals complained of.

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To this declaration the defendants pleaded as follows :—That the plaintiff and *John Terry Hughes* did, before the committing of the grievance, to wit, on the twenty-eighth day of May, in the year one thousand eight hundred and forty-nine, in the city of Sydney, steal, take, and carry away five bank notes for the payment of fifty pounds each to the bearer thereof, and other moneys (describing them) of the goods and chattels *Donald Beatson*, and of the value of two hundred and eighty-two pounds ; and the plaintiff and the said *John Terry Hughes* did appear on bail before Alderman *Egun* and *James Mitchell*, Doctor of Medicine, Justices of the Peace, at the police office, in Sydney, to answer a charge of stealing moneys (that is to say, the said bank notes), preferred against the said plaintiff and *John Terry Hughes* by the said *Donald Beatson* ; and that *James Higgins*, an inspector of police, deposed before the said justices that he apprehended the said parties on the afternoon of Monday by virtue of a warrant, which he then produced, and in which they were charged with stealing ; and that the further hearing of the case was postponed until Friday then ensuing ; and that the said *Beatson* did go on the evening of the 28th day of May, in the year one thousand eight hundred and forty-nine, to a public-house situate in Pitt-street in Sydney, kept by one *Chambers*, by appointment previously made by the said *Beatson*, and the said plaintiff and *John Terry Hughes*, for the purpose of paying to the plaintiff a sum of money as his moiety of the proceeds of cattle previously taken by the said *Beatson* to South Australia, and there sold on account of the said plaintiff and *Esther*, the wife of the said *John Terry Hughes* ; and that the said *Beatson*, on the day and year last aforesaid, found the plaintiff and the said *John Terry Hughes*, and one *John Kinnear*, in the said public-house ; and that the said *Beatson* placed upon a table, in the room, the bank notes hereinbefore mentioned ; and that the said plaintiff and *John Terry Hughes* then stole the same ; and that the said *Beatson*, the next day, gave information thereof to the police ; and that a warrant was thereupon granted for the apprehension of the said plaintiff and the said *John Terry Hughes* ; and the defendants aver that it was for the public benefit that the said several matters should be published ; and that the report of what took place at the police office was correct, and was published without malice ; and the defendants aver that it was for the public benefit that it should be published that

1849. the taking away by the plaintiff and the said *John Terry Hughes* of the
 HUGHES moneys of a man under the circumstances hereinbefore set forth was an
 v. act of stealing, and criminal ; and that it was for the public benefit
 KEMP. that the public should know that the plaintiff and the said *John Terry*
 Stephen C.J. *Hughes* had been guilty (as the fact was) of stealing the moneys of the
 said *Donald Beatson* ; and the defendants aver that divers individuals
 in this Colony have considered and held out that the circumstances
 hereinbefore set forth do not amount to stealing ; and that it was for
 the public benefit that the said publication should be made ; wherefore
 the defendants committed the grievances, &c.

To this plea the plaintiff demurred, and showed the following causes
 of demurrer :—*First*, that the plea was double (so far as it related to so
 much of the libel, as purported to be a report of the proceedings in the
 Police Office), inasmuch as the plea justified the said matters on the
 grounds of the truth of the charge ; and also set up as a defence that
 the report of the said proceedings was correct ; and also set up as a
 defence that the said report was published without malice. *Secondly*,
 that it did not allege any particular fact, or facts, by reason whereof it
 was for the public benefit that the matter charged should be published.
Thirdly, that the particular facts set forth in the plea were not in any
 way connected with the averment, that it was for the public benefit
 that the said matters should be published. *Fourthly*, that the plea
 was uncertain, in this, that it did not set forth how the money was
 stolen. *Fifthly*, that it was uncertain, inasmuch as it did not set forth
 the names of the individuals who had considered that the circumstances
 set forth did not amount to stealing. *Sixthly*, that the plea was
 repugnant and absurd, because it is therein in substance averred that
 there are persons in this colony who believe that stealing does not
 amount to stealing.

The demurrer was argued before us on the 5th ultimo, by Mr. *Lowe*
 for the plaintiff, and Mr. *Fisher* for the defendants, when the following
 cases were cited :—*Jackson v. Alloway* (2), *Fearne v. Cochrane* (3),
Hammond v. Colls (4), *Hickinbotham v. Leach* (5).

We have considered the objections raised by the demurrer to the
 plea, and our opinion is as follows :—As by the Colonial Act, 11 Vic.,
 No. 13, sec. 4, the truth of a libel is no valid justification, unless con-
 joined with an averment that by reason of some specific facts, its
 publication is for the public benefit, we think that the 2nd, 3rd, and
 6th of the causes assigned are objections clearly in substance. They

(2) 1 D. & L. 919. (3) 2 D. & L. 797. (4) 1 C. B. 916. (5) 10 M. & W. 361.

suggest, respectively, the absence of any facts which could make the publication beneficial, the inadequacy for that purpose, of the views said to be held upon the law of larceny, and the absence of connection between those notions, and their publication for the common advantage. These are not the less objections in substance, because they are pointed out as required by the Statute Eliz. c. 27, for the specification of formal objections; for the mode of exhibiting, or naming, cannot alter the nature of the thing. These objections, then, being such as we have described, are by Mr. *Lowe's Law Simplifying Act* excluded from consideration, as the first cause assigned for demurrer (namely, that of duplicity) is clearly only an objection in form. *Smith v. Clench* (6). and 1 *Wm. Saund*, 337, b.

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We are of opinion, that that part of the plea which justifies the report of the proceedings at the Police Office, is not bad for duplicity. It would seem that, by the common law, it was no defence to an action for libel, contained in the publication of a preliminary proceeding before a magistrate, that the report was faithful and correct; nor that the matters contained in it were true. *Rex v. Fisher* (7); *Duncan v. Thwaites* (8). To the same effect is the 5th section of the Act, 11 Vict., No. 13. The only way, therefore, in which a defendant can avail himself of the correctness (or, in other words, the truth) of such a report, is to join it in his plea with the other matters, which, by the 4th section of the Act, are required to be joined to the averment of the truth of the libel. The defendants here assume to have pursued the course required by that section; for they state that transactions occurred at the Police Office, the same as those mentioned in the Report; that the Report was beneficial to the public; and that certain facts made its publication so. If the objection, "that the plea justifies the said matters on the ground of the truth of the charge," is to be considered applicable to the *Report*, then the truth and correctness of the Report, being identical, cannot constitute duplicity, and, on the other hand, the absence of *malice* in the Report being immaterial to the defence under the 4th section, the averment of it cannot affect the plea, so far as respects the Report. For the rule is clear, that "matter immaterial cannot operate to make a plea double." *Stephen on Pleading*, Ed. 3, p. 259. This formal objection of duplicity, to so much of the plea as respects the Report, we consider an objection to the whole of it; so as to prevent the plaintiff from going into substantial objections, to other parts of the plea. For "a pleading which is bad in part, is bad altogether." *Steph. Pl.* Ed. 3, p. 107.

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In arriving at the conclusion, that this objection of duplicity, to so much of the plea as respects the Report, is an objection to the whole of it, we (regarding the well-known rule, that there can be no demurrer upon a demurrer and the reason given for it) have carefully considered the question, whether the plaintiff's demurrer should be considered by analogy to the case, where the plaintiff pleads an entire replication to an entire plea, or to the case mentioned in 1 *Vn. Wm. Saund* 28 a., note e, of a divided replication to the separate subjects of a joint plea, to a declaration containing several separate subjects of complaint. See *Earl of Manchester v. Vale* (9); and *Webber v. Twill* (10.) And we are of opinion that the plaintiff's demurrer must be treated by analogy to the case of an entire replication to an entire plea. For the matters complained of in the declaration may be divided into three portions:—First, the heading "stealing money;" secondly, the report of the proceedings at the Police Office; thirdly, a narrative of facts. Now, though the Report may be separated from the narrative, so as to be intelligible, the *latter* is not so when detached from the former. For, without reference to the Report, neither the expression "Beatson, the prosecutor" at the commencement, nor the phrase "the individuals complained of" at the end of the narrative, could be understood. As, therefore, we consider the declaration to contain an indivisible complaint, to which an entire plea has been pleaded, if any part of that plea is bad, the whole is bad also; and we must correspondingly hold that an objection to any part of it, such as the Report, is an objection to the whole plea.

We proceed, therefore, to the consideration of the other causes assigned by special demurrer. And, as to the 4th cause, we think that the formal statement in the beginning of the plea, being ascertained as an indictment for larceny, is sufficient for a pleading in a civil action; unless it be said that such statement in the plea must be taken with reference to the transactions mentioned in a subsequent part, and that *that* shows that there was no larceny in construction of law. Whether the transaction amounts to larceny or not, we are not called on to determine, for if it is not larceny, the objection is clearly resolvable into a ground of general demurrer, since, if the transaction were not a case of larceny, it could not be for the benefit of the public to publish that it was a case of larceny.

As to the 5th cause of demurrer, we intimated an opinion during the argument, that it was untenable: on the ground that the insertion of the names might impose great inconvenience on the defendants, and

(9) 1 V. Wm., Saund. 27. (10) 2 V. Wm., Saund. 127, d. and f.

occasion great prolixity in the plea. To that opinion we adhere, for if the effect of the defendant's allegation is, that there was a *general impression* that the matters stated did not amount to stealing, then the insertion of names would be both inconvenient and prolix, and if the effect of the averment is, that a comparatively *few* entertained the opinion mentioned in the plea, then we consider that a publication for the instruction of those few could not be for the benefit of the community at large, even if the few entertained an incorrect conception of the law. In this view the last objection is resolved into one of general demurrer; and a party cannot object to the informality of an averment, when the fact alleged is virtually a nullity, for, by the rules of pleading, certainty is only required to material and traversible facts.

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We are therefore of opinion that the plaintiff's demurrer is untenable

[IN EQUITY.]

1849.

TERRY v. WILSON. (1)

Oct. 13.

Jan. 3, 1850.

Crown grant—Interest of a mere promisee—Governor Darling's proclamation, effect of—Husband and wife—Infant—4 Will. IV, No. 9.

Stephen C. J.
Dickinson J.
and
Manning J.

In the year 1820 J., being in possession of certain land in Sydney, made his will devising the said property to S., an infant, the defendant, appointing trustees therein for S., and shortly after died. The surviving trustee in 1823 obtained a lease of the land from the Crown, in trust for S., for twenty-one years; in 1829 a proclamation was issued by Governor Darling, promising a grant in fee simple to all occupiers or lessees of Crown lands under certain conditions. S., being still an infant, married W. in 1834, and the same year W. and his wife applied for a grant to the Commissioners under the Act, 4 Will. IV, No. 9, but before the issue thereof W. sold the land, T. being the purchaser; the grant was issued in 1835 to W. and his wife, their heirs and assigns. W. died in 1839 and his wife came of age about the same time.

In a suit by the representatives of T. to prevent S., the defendant, from enforcing a judgment obtained against them in ejectment.

Held, the defendant was at the time of her marriage possessed of an equitable claim to the fee simple in the land, and the lease, if not void (as it was held to be for uncertainty), being in derogation of that claim, could not bind her, and the husband had nothing to dispose of.

The Court is not a Court of Appeal from the decisions of the Commissioners under the Claims to Land Act, 4 Will. IV, No. 9, and the grantee can only be constituted a trustee for another person where there is fraud or unconscientiousness. The usual clause, in grants under the Act, that "the lawful rights of all persons, other than the grantees, shall enure and be held harmless," could not avail the plaintiffs, without subverting the rules for the protection of the property of married women and infants.

The interest of the promisee under the proclamation was nearly equivalent to an estate in fee; (*semble*) an indefeasible interest, except as against the Crown.

THIS was a bill filed by the representatives and others claiming under the will of the late *Samuel Terry*, against the defendant, the widow of the late *Ambrose Wilson*, seeking the decree of the Court to declare the defendant a trustee for the plaintiffs of certain premises; that the defendant might be decreed to convey the same to the plaintiffs, they being willing to pay such sums as she might have paid to the Government in respect of the said premises; and that the defendant might be restrained from proceeding with a certain action of ejectment commenced by her.

(1) *The Sydney Morning Herald*, Aug. 23, Oct. 15, 24, and 27, 1849; Jan. 4, 1850. Cited 9 S.C.R. App. 14, and *Cockcroft v. Hancy*, *post*, Jan., 1859.

The facts of the case are fully set out in the judgment of the Court, on Appeal, *post*. The bill came before his Honor Mr. Justice *Manning* on August 21, 1849, and judgment was reserved.

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On October 13, after stating the facts and argument,

MANNING, P.J., said : I have now considered this case fully, and have come to the conclusion that the defendant is entitled to have the bill dismissed with costs. The legal title under the grant has been established by two trials, and by the judgment of this Court in its common law jurisdiction, pronounced upon questions raised on each occasion ; and although there is room for doubt whether, upon principles of popular equity or moral propriety, that title ought, under the circumstances of this case, to have been asserted, I can see no ground upon which this Court can disturb her in the enjoyment of what the law has given her. It may be conceded that if the defendant's interest at the time of her marriage was, as between herself and other subjects, such as would pass to her husband by the fact of marriage, Mrs. *Wilson*, as well as her husband, would upon obtaining the grant have become trustees for the vendee ; but I think she had no such interest. The lease was clearly bad for uncertainty in the description of the land, which is so described as to make it impossible to say what land "on the east side of Pitt-street" is actually comprised, or to identify it with that which was possessed by *Joel Josephs*, and subsequently granted to Mr. and Mrs. *Wilson* ; and I cannot see the force of the argument (which was much pressed), that the act of the Crown in adding to the quit-rent the amount ostensibly due for rent on the lease, and that of Mr. *Terry* in paying such quit rents, proved, as against the defendant, that her tenure was leasehold. I also do not overlook the fact that the lease was procured by Mr. *Wilmot* during the infancy of the defendant, and without her authority ; but it is unnecessary to consider the effect of that circumstance.

It is not necessary to pronounce what precise estate Mrs. *Wilson* had at the time of her marriage ; but the lease being out of the question, it appears to me clearly that it either partook of the nature of a fee-simple by occupancy and by force of the promise contained in the proclamation, or that there was no recognisable interest upon which the marital rights of Mr. *Wilson* could attach. In the one case, the defendant could not be deemed a trustee for her husband's vendee, because the sale by him was wholly unauthorised as against her ; and in the other, the grant must be taken to have been the absolute gift of the Crown, at the time of its issue, and, as regards Mrs. *Wilson*, to be free from any trust, arising from an act of sale not authorised by the Crown, nor responsibly

1849. participated in by herself. It would seem that in strictness of law, the defendant had no defined estate whatever before the grant, but substantially the royal promise of a grant upon application gave her that which was nearly equivalent to an estate in fee, from the date of the proclamation. I do not conceive that the promise had such a stringent effect as to give the promisee an indefeasible right which could be enforced as against the Crown; but it is clear that the right, *valent quantum*, was to the acquisition of an estate in fee. Such being the defendant's title at the time of her marriage, I think the subsequent grant to her ought, in equity as well as at law, to operate for her exclusive benefit, and not as a voluntary settlement derived from her husband and liable to be affected by the equities which he had created.

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Decree, that the bill be dismissed with costs.

The following authorities were referred to:—Sir *E. Turner's case* (2); *Chancey's Law of Husband and Wife*, 252; *Tudor v. Samyne* (3); *Keech v. Sandford* (4); *Taster v. Marriott* (5); *Pickering v. Vowles* (6); *Spencer v. Gray* (7); *Ferrer v. Earl of Winterton* (8); *Taylor v. Attorney-General* (9); *Story Eq. Jur.* I 438, 439, II 1265, 788-790, 1212; *Sugden's V. and P. cap.* IV, sec. 1.

1850. The case afterwards came on Appeal before the Full Court, on
Jan. 3. October 26, and on Jan. 3, 1850, the reserved judgment of the Court was delivered by—

The CHIEF JUSTICE. This was an Appeal by the plaintiffs from a Decree of the Primary Judge in Equity, dismissing the bill with costs. The case was argued before us at the Sittings for Appeals, on the 26th October last, by the *Solicitor-General*, Mr. *Donnelly*, and Mr. *Fisher*, for the complainants and Mr. *Broadhurst* and Mr. *Lowe* for the defendants, when we took time to consider of our decision.

The facts have been already more than once before the Court, and they are fully stated in Mr. Justice *Manning's* judgment; but it may be desirable, on this occasion, to recapitulate them. In the year 1820, and for some years previous, *Joel Josephs* was in possession of an allotment of land, with houses erected thereon, in Pitt-street, Sydney, which he held, apparently, as many other persons then did, by the license of the Crown, given to him, or some earlier possessor, by the Governor of the Colony, but, so far as is now known, on no other title. What particular

(2) 1 Vernon 7. (3) 2 Vern. 270. (4) 2 Eq. Ca. Ab. 741, and Sel. Ca. Ch. 61.
(5) Ambler, 668 and note 1. (6) 1 Bro. C. C. 197. (7) Sept. 1848, ante,
p. 477. (8) 5 Bev. 8. (9) 8 Sim. 438.

right or interest that kind of occupancy, or the permission or promise under which the parties claimed in those days, either gave or was generally supposed to give, and whether for years or in fee, or in the first instance for a term only, but with the promise eventually of an estate in fee, the evidence in this case does not disclose ; and it would not be very easy to determine. In July, 1820, however, *Josephs* made his will, attested by two witnesses only, by which he gave to his natural daughter *Sophia* his two houses in Pitt-street ("I give all those my two houses situate in Pitt-street") and all the residue of his "estate and effects whatsoever, and of what nature or kind soever, to hold to her, and her executors, administrators, or assigns," on her majority or marriage. He appointed two persons his executors, to be her guardians and trustees, and directed the rents of the said houses to be, in the meantime, applied to maintain and educate her. On the death of *Josephs* soon after the date of the will, the trustees entered into possession, the daughter being then little more than 2 years old. On the 30th June, 1823, one of the trustees (the other having died) accepted or obtained a lease in his own name from *Governor Brisbane*, in trust for the daughter, for twenty-one years, at an annual quit rent. Up to that time, it does not appear (it is, at least, not shown) that any rent had been demanded by the Crown, or was payable. The description of the land as contained in this lease, is imperfect and uncertain, but there can be no doubt, as to the identity of the property intended. Neither the exact site, however, nor the existence of buildings on the land were mentioned in the instrument.

In June, 1829, appeared the Proclamation of *Governor Darling*, by which a Grant in fee-simple was promised, on application to "every person or his lawful representative," who was in possession of any land in Sydney, on or before the 30th June, 1823, either "by lease from the Government, or by mere right of occupancy," on certain conditions, of which one was the payment of all arrears of quit rent, by an increased rate of rent under such grant ; but all quit rent prior to the said 30th June, 1823, were relinquished. Three months' notice is required to be given of "the intention to complete a grant," in order that "all persons interested may have an opportunity of proving their respective titles—reserving, however, and keeping harmless" (so is the proclamation worded) "all rights of other private individuals, which may be lawfully established at any time hereafter."

In August, 1833, was passed the Act 4 Will. IV, No. 9 (continued and amended subsequently by other acts) for appointing Commissioners to determine on claims to land. This Act recites, in substance, as

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follows :—That many persons had obtained possession of lands, by the authority of the several Governors of the colony, under promise of Grants to be made them thereof ; but that, in many cases, the Grants had unavoidably been delayed, and the lands had come into possession of other persons, claiming to hold the same as their lawful right, obtained through or under those who originally obtained possession as aforesaid ; and that, in many cases, by reason of the death, incapacity, or absence, of such last-mentioned persons it had become impossible to produce strictly legal titles ; and that it was expedient, that a remedy should be provided in such cases, and Grants be made to the persons “ who have now the just and lawful right thereto, obtained as aforesaid.” And then it is enacted, that the Commissioners to be appointed shall have power to determine on all applications for Grants, by persons holding or claiming to hold land *through or under other persons, who originally obtained possession by the authority of any Governor, under promise of a Grant to be made to them*, as mentioned in the preamble. The Commissioners are to “hear, determine, and report upon” every such application ;—in so determining, they are to be guided by the “real justice and good conscience of the case, without regard to legal forms and solemnities”—and they are to report in favour of an applicant, whenever they shall be satisfied that he “is entitled, in equity and good conscience, to hold the land, and to have a Grant” thereof made to him :—provided that it shall not be compulsory on the Governor to issue any such Grant, unless he shall think proper.

In February, 1834, the infant, *Sophia Josephs*, then about 16 years of age, married *Ambrose William Wilson*, and, in May following, they presented jointly a memorial to the Commissioners, under the Act, applying for a Grant of the allotment in question to be made to them, claiming under the aforesaid will and lease. Almost immediately afterwards, however, it appears, *Wilson* proceeded to a sale of the land by auction, in lots, and the testator *Terry*, under whom the plaintiffs claim, purchased the whole, and paid him nearly a moiety of the purchase money for them. He appears to have bought none of the lots at the sale, but to have obtained them at advanced prices from the purchasers at such sale. The defendant in this suit denies, and it is not distinctly shown (so far as that fact may be material), that she was any party to those sales. Be that as it may, Mr. *Terry* took possession ; but no conveyance of any kind seems to have been executed, and, in February, 1835, the Crown Grant issued to *Wilson* and his wife, their heirs and assigns. There is the usual clause inserted, however, that “the lawful rights of all persons other than the grantees shall enure and be held harmless.”

The Grant purports to have been made, under the Claims to Land Act, on the recommendation of the Commissioners. And it appears to have been issued in pursuance (or supposed pursuance) of the Proclamation; since a quit-rent is reserved, in accordance apparently with the terms there stated, respecting the arrears of such rents.

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Afterwards, that is to say, in May and September, 1835, followed the petitions to the then judges of this Court by *Wilson* and his wife, which are noticed in our judgment in the ejectment suit. The first petition recites the will and the Grant (making no mention of the lease), and states that the petitioners, after the marriage, having no means of repairing the houses, "deemed it more to their interests to dispose of the premises"; but that, as the female petitioner was a minor, they could not complete the sale, and give good titles, without the authority of the Court. It then prays that trustees be appointed for her, to "complete" the sale, and invest the proceeds for the petitioners, and their children should they have any. The fact of some previous sale, therefore, may be collected; but none is specifically or distinctly mentioned. The second petition, however, which has substantially the same recitals as the former, contains no allusion whatever to a former sale. It prays that trustees may be appointed for the infant, to sell the property under the direction of the Court. Trustees were accordingly appointed, to whom Mr. *Terry* paid the balance of his purchase money; those trustees and Mr. *Wilson* executed a conveyance; and *Terry*, and those who claim under him, have been in possession ever since, and expended large sums in improvements on the property. He also paid the quit-rent, reserved by the Grant, as by its terms the grantee was bound to do.

The husband died in 1839, about which time *Sophia Wilson* became of age; and she brought her ejectment in 1848. This Bill was thereupon filed against her. It does not rely on the sale or any of the proceedings under the said petitions, but insists that the property at the time of the defendant's marriage was leasehold, and only convertible into freehold under the Proclamation in favour of the person then lawfully entitled:—that, as she claims under a Grant, which was obtained on her memorial to the Commissioners, stating that the property was leasehold, she is bound by that representation;—and the plaintiffs maintain, that such leasehold interest vested absolutely in her husband, who consequently could dispose of it as he thought proper. On the argument before the Primary Judge accordingly, and afterwards on the Appeal, it was contended that the defendant was a trustee, and ought to be so declared for the plaintiffs, the Grant having mistakenly been

1850. issued to her, but with a saving of the rights of all persons then entitled to the same. It was argued, that the procurement of the Grant by *Wilson*, in his own and his wife's name, was in effect a mere voluntary and fraudulent settlement, void as against the previous vendees. The Proclamation, it was observed, gave *her* no claim, but enured for the benefit, only, of the "lawful representative" of the lessee, or occupant, which representative was the husband only, or, rather, at the time the Grant issued, the testator *Terry*, as the purchaser under him. The Proclamation, the Act of 1833, and the Grant, all alike showed, that the Crown meant only to give a title to the true owner, the party entitled in equity, and good conscience, to be so deemed. And other enactments passed subsequently, it was said, supported the same conclusion. But here the Commissioners had, in ignorance of the facts, decided in favour of the wrong party; and a member of the Board had given evidence, that their recommendation would have been in favour of the vendee, had they known those facts. The leasehold interest (the learned counsel contended) could not be separated from the right to the enlargement of it, conferred by the Proclamation. There was no more than a chattel interest, until the option to accept a larger estate was declared, and then the subsequent title was engrafted on the prior one. It is submitted, moreover, in the Petition of Appeal, that the defendant was barred by acquiescence and lapse of time; but this point was not argued, and there is nothing to show that she has acquiesced, since her coming of age and discovery, or that any injury has accrued to the plaintiffs, by the delay afterwards to prosecute her claim.

On the other hand, it was argued for the defendant, that she had a claim to the fee, under the will, and the promise contained in the Proclamation, by "right of occupancy"—which was an interest, that never vested in *Wilson*. Could he *alone*, it was asked, have obtained a Grant? His vendees were no representatives of any one, within the meaning of the Proclamation. The term was a *designatio personae*, and not a matter annexed to the estate. The lease of 1833 ought not to have been accepted. Before that acceptance there was no tenancy. The lease, however, could not affect the question, for it was uncertain and void. The wife's interest, if it be one cognizable by law at all, savours of the reality, like the expectancy of an heir, and was barrable by fine. It was no mere chattel interest. The defendant's case, in short, was this:—She had a promise of a Grant, and she marries; her husband sells the land, and, afterwards, the Grant issues to her and him. What right has the vendee, said the learned counsel, against a married infant, under such circumstances as these?

The cases and authorities relied on, in addition to those cited at the original hearing, were the following :—*Purdew v. Jackson* (10); *Lawes v. Bennett* (11); *Townley v. Bedwell* (12); *Blake v. Blake* (13); *Doe dem. Pennington v. Tanisre* (14); 9 *Jar. and Byth.* 11, 2 *ibid.* 74, and 5 *ibid.*, 572; *Taster v. Marriott* (15); *Taylor v. Attorney-General* (16) (showing that Treasury Minutes may be referred to); *Rawe v. Chichester* (17); and *Seabourne v. Powel* (18).

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We have fully considered this matter, and we are of opinion that the Decree of dismissal was right. The plaintiffs' case is a very hard one, but the question for us is, whether there are any circumstances to constitute the defendant, who was an infant at the time of the transactions relied on, a trustee for those parties, and we cannot see that there are. *Joel Joseph* bequeathed to his daughter, it is clear, whatever interest he then had in the property. What that was, we have already said, it is not easy to determine; but, that there was an expectancy beyond that of a mere leasehold, seems plain from the nature of the bequest, which was to a child then only two years of age, to vest in possession on her marriage or majority. We think that her rights are not to be prejudiced by her trustees' acceptance of the lease in 1823, even if that instrument were not void, which we clearly conceive that it was. The Proclamation promised a Grant to every person, or his representative, who was in possession *by right of occupancy*, on or before the 30th June, 1823. Now *Josephs* was clearly a person answering that description; and the infant devisee was, in that behalf, his "representative." If, however, the lease bound her, then equally the Proclamation operated in her favour: but, in that event, in her own right, as a person (by her trustee) in possession on the said 30th June, by "*lease from the Government*." In this state of things, her husband takes on himself to sell the property. The first question is, had he a right to do so? But, if he had, in the *then* state of things, it will not necessarily follow that, on the Crown's afterwards giving the fee jointly to him and his wife, she was not entitled to retain the gift, but became a trustee thereupon for her husband's vendee.

We will assume that *Wilson* sold the property, having an interest by virtue of that lease; although we think that he had none, for the reasons already given. The wife, however, who is not shown to have been a party to that sale (unless the petition of herself and her husband be so

(10) 1 Russ. 1. (11) 1 Cox 167. (12) 14 Ves. 591. (13) 7 Br. P.C. 241.
(14) 13 Jur. 119. (15) 2 Amb. 663. (16) 8 Sim. 436. (17) 2 Amb. 719.
(18) 2 Verr. 11.

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taken), or, if she were a party, was then a girl of sixteen only, presumably ignorant of the consequences, and under her husband's influence and control, had previously joined him in asking for a Grant, to be made out to themselves, and, after the sale, but before the completion by any conveyance, such Grant is issued. What equity that state of things creates, against the wife, then an infant, to enable the vendee under the husband to have her declared a trustee for him, we are compelled to say that we cannot discover. The Grant gave each a joint estate for their lives, with mutual benefit of survivorship; and she may even have yielded too much when she asked the Crown to confer on her husband that extent of interest. But, why, without fraud, should she lose the benefit and title so given to herself?

The plaintiffs' case is not aided, we think, by the petitions, and the proceedings thereon, of 1835. We have already held, that they did not bind the infant, and, no doubt, the plaintiffs do not now rely on them. But it is remarkable, that the petition finally acted on alludes to no past sale. It asks that the petitioners might be allowed to *proceed* to a sale, and the Order was that one should be had, under the direction of the Court, for the infant's benefit—the moneys to be invested, and held for her; which, by the way, so far as we can perceive, was never done. It is clear from these proceedings, that the property was at that time treated, on all hands, as being that of the infant,—certainly not that of *Wilson* alone. And if the sale from him could have been relied on, the supposed infant trustee could have been then as easily decreed against, as now.

With respect to the discussion, concerning the effect of the Claims to Land Acts,—we are entirely of opinion with the plaintiffs, that Grants were only intended to be given, under the recommendation of the Commissioners, for the benefit of the party really and fairly entitled in each case to them. But, if we thought that the Grant had, in this instance, been recommended and made to the wrong person, which is not our opinion, we should still be unprepared to hold, that the mistake created the wife, under the circumstances of this case, a trustee for the right party, which is what the court is here asked to hold. The Act, as was observed by Mr. Justice *Manning*, in *Spencer v. Gray* (19), 22 September, 1848 (speaking of the 5 Will. IV, No. 21, the enactments of which are, as to this point, the same as the one in question here), does not constitute this Court a Court of Appeal from the decisions of the Commissioners. And both that case and *Walker v. Webb* (20), decided by

(19) *Ante*, p. 477.

(20) *Ante*, p. 253.

Mr. Justice *a'Beckett*, 25 February, 1845, are authorities for holding, that *fraud* or *unconscientiousness* in the grantee is necessary, to constitute him a trustee for the party entitled.

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But it seems plain, that the Act of 4 Will. IV (the only one then in force) had no application to this case. According to the preamble, as well as the enacting part, it embraces cases only, in which persons have "*obtained possession*, under promise of a Grant," and in which the applicants claim, through persons "*who originally obtained possession*" under such promise. Now neither *Josephs*, nor (so far as is shown) any of his predecessors ever obtained possession under any such promise, although he or they, or this defendant in his right, may have received such a promise (as *e.g.* under Governor *Darling's* Proclamation) some years after having been in possession. But, if *Josephs* or any such predecessor *did* obtain possession, originally, under such a promise, then his equitable claim to the fee, under it, descended to this defendant, the lease, being clearly in derogation of that claim, could not bind her, the husband had nothing to dispose of, and all the arguments, consequently, as to the vendee's rights under him, are at end.

We conceive, however, that such was the infant's claim, under the Proclamation, though previously the *fee* may never have been promised; and that such claim existed prior to and independently of the lease. Notwithstanding the informality of his will, there is nothing to show that *Josephs* ever occupied, as a claimant of less (eventually) than the fee. He may have had no mode of enforcing such a claim, and all his interest may have rested, alone, on the honor or bounty of the Crown. The same, in fact, may be said of the Proclamation. But, under that document, the representative of every person who was in possession (on or before the 30th June, 1823) by *right of occupancy*, might clearly claim a grant in fee. This, it appears to us, was no incident or matter annexed to the lease, even if the infant could be held to claim under the lease. It was a right, interest, or claim, flowing from the grace of the Crown; founded, doubtless, on the desire to encourage settlements in the colony, and to hold out temptations for permanent and valuable improvements on its lands. Now, at the time of *Sophia W'son's* marriage, who was entitled to—or could successfully have claimed that grace? Clearly, it appears to us, herself. If not, why did her husband and herself, jointly, apply to the Commissioners for Grants? Why was her name inserted with his, in the instrument recommended by them? But, that she (alone or with her husband) was throughout considered entitled to the fee, and nothing less, however the right originally may

1850. have been acquired, is too plain for dispute. The proceedings in the Court after the issue of the Grant, and the order made for investing the proceeds of any sale, for her and her children's benefit, tend strongly to show the fact. Surely, then, her husband's title to alienate that equitable fee, in his own right, from her and her representatives, cannot on any principle of law be maintained. And, if not, no assent of *hers*, labouring as she then was under a double incapacity, could confer validity on any such assumption.

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As to the three cases most relied on, to which we shall advert presently, they are clearly distinguishable. No person will dispute, that a husband has a right to his wife's chattels real. But the question is, as to this, whether the wife had not something more; and we have already expressed the opinion, that she had. The case was put for the plaintiff, as if she or her husband had an option to exercise, before the estate was leasehold only. But, if so, the opinion would seem to have been declared, when the Grant in fee was applied for. The truth is, however, that the leasehold interest was clearly never thought of. The possession in *Josephs*, his will, the lease, the Proclamation, were all regarded as so many evidences of the infant's claim to that Grant. But, for any other object than that of establishing a right to the fee, the Proclamation was useless.

Lawes v. Bennett (21), followed by *Townley v. Bedwell* (22), are to this effect only, that if a man make a lease, with an agreement that the lessee may within a fixed period purchase, and the lessor die, and afterwards the lessee elects to take the fee, in such case the land thereupon becomes, from the date of such election, as between the deceased's heir and executor, personal estate. This merely shows, that a leasehold interest may, for certain purposes, be dealt with as real estate. And the converse holds equally. But the value of the principle, or at any rate, its importance to the plaintiffs, does not so clearly appear. In the more obvious view of those cases, they rather assist the defendant. Here, however, is a very different state of circumstances. After making a lease, the landlord contracts with his lessee to sell him the entire estate. It will surely not be disputed, that the latter is then equitable owner of the fee. Suppose this person be a female, and that she marries. The husband knowing of this equitable fee, takes on him to sell it, and then dies. That is really, in effect, it seems to us, on the plaintiffs' own showing, the case here. But, because the landlord is the Crown, and the promise was to the lessee, or a person under whom she became so, and

to her or his *representatives*, a term not wholly free from ambiguity, a distinction is taken, and the promise is supposed to have been, to the female and her husband, and any body to whom he might choose to convey that character.

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The case of *Seabourne v. Powell* (23) is scarcely more to the purpose. The trustees of a married woman, having acquired a title to certain leasehold property, which, before she had a title, she and her husband had mortgaged for money borrowed, were decreed to confirm that mortgage, the new estate being, as it was said, "grafted into the old stock." But several circumstances distinguish that case from the present. The wife, in the first place, had joined her husband in mortgaging (by a deed, we may presume, in itself binding and effectual) a property which was clearly leasehold, and nothing more. Her husband, therefore, had plainly the right to mortgage; and she, having joined him, was afterwards estopped to set up her previous want of title. But here the husband's right is the very point in debate, and the wife's concurrence with him, had it even been by a conveyance in other respects binding, was inoperative by reason of her infancy. In the next place, in the case cited, the wife was guilty of fraud, in procuring the mortgagee to sue a surety; and, finally, the money borrowed had been expended on the premises, which she sought to retain, nevertheless, discharged of the liability to repay it.

With the views thus taken of the infant's rights, and of the nature of her interest, upon and after her marriage, an opinion on the Claims to Land Acts, beyond that already expressed on the 4 Will. IV, No. 9, is unnecessary. And if the effect of the clause, in Grants issued under them, and inserted in the Grant to *Wilson* and wife, for protecting the rights of other persons, be all which the plaintiffs would attribute to it, their case would not (consistently with these views) be sustained, since we think that, unless the rules and forms established for the protection of married women and infants, and their property, be subverted, no other person than herself has any such right. The appeal, therefore, has, in our judgment, wholly failed, and must be dismissed, with the costs attendant on that failure.

Decree upheld. Bill dismissed, with costs.

(23) 2 Vern., 11.

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REGINA v. BLAND. (1)

Oct. 18.

Stephen C.J.

Criminal information—Inciting to a breach of the peace—Jurisdiction of the Court.

In applications for a criminal information, the Court has a more extensive jurisdiction than a Grand Jury, inasmuch as it can take into account the conduct and character of the prosecutor, and the circumstances of the act complained of.

In this case a rule *nisi* had been obtained by *Michie* on behalf of *Robert Lowe*, Esq., M.C., calling upon *William Bland*, Esq., to show cause why a criminal information should not be filed against him on two grounds: first, on the ground that the letter next referred to was written with the apparent intention of inciting Mr. *Lowe* to commit a breach of the peace; and, secondly, on the ground, that the same letter was an apparent breach of Mr. *Lowe's* privileges as a member of the Legislative Assembly, and calculated to intimidate him in the performance of his duty as such member.

The letter was to the following effect:—

October 11th, 1849.

Sir,—I have this moment read the report of your speech of yesterday evening in the *Sydney Morning Herald* of to-day, and I feel no doubt that you have used your position in the Council to vent your private malignity against me. I am, however, recommended not to call upon you for the satisfaction of a gentleman, because you have on more occasions than one (where the claim for reparation was, from the nature of the insult inflicted, even stronger than in this case) in a manner the most cowardly evaded it. I shall, therefore, content myself with merely expressing my opinion, that you are a coward and a scoundrel, but which opinion I shall be happy to retract, if it is in your nature to give me an opportunity.

I am, Sir,

Your most obedient servant,

W. BLAND.

Robert Lowe, Esq., M.C.

On October 18th,

Michie moved to make the rule absolute.

The *Solicitor-General* and *Darvall*, *contra*. The affidavit of the defendant showed that there was no intention to provoke a breach of the peace, and this was confirmed by an affidavit of Mr. *Wentworth*. The following cases were cited:—*The King v. Phillips* (2); *Prideaux v.*

(1) *The Sydney Morning Herald*, October 12 and 20, 1849.

(2) 6 East, 464.

Arthur (3); *The King v. Larriou* (4); *The Queen v. Lawson* (5);
Keiley v. Carson (6); *The Queen v. Langley* (7); *The Queen v. M'Innes*,
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Michie, in reply.

His Honor the CHIEF JUSTICE, after stating the terms of the rule, and that one ground of it, viz., that which related to the breach of Mr. *Lowe's* privilege as a member, must have found its way into it by mistake, and with which he had no hand, thinking as he did, that since the case of *Keiley v. Carson*, a member of a colonial House of Assembly had no such privilege as members of the House of Commons enjoyed, said there were really only two grounds now to be considered. In deciding them, the question incidentally arose, whether an indictment would lie, for writing a letter containing abusive language, the natural tendency of which would induce a party to commit a breach of the peace, even though it was sworn that the letter was not written with such an intention. His Honor said he was of opinion no indictment could lie, because this was not like a case of murder, or other cases where the question of intention had nothing to do with the commission of the crime, at least not in the mind. The question was would a Grand Jury looking at the matter as the Court looks at it, send the case down for trial before a petty jury. The fact that a petty jury might acquit the defendant, had nothing to do with the decision the Court ought to arrive at. A Grand Jury, however, would not have the same evidence before it, that this Court has. This Court has a peculiar jurisdiction, and takes notice of evidence not admissible before a grand jury. The jurisdiction this Court has is different to that exercised by the Attorney-General. This peculiar jurisdiction, amongst other things, enables the Court, for instance, to inquire into the conduct and character of the prosecutor; it has also a discretion to exercise, whether under all the circumstances, the prosecutor has so behaved himself, that he is entitled to call upon the Court to exercise this peculiar jurisdiction. The Court, therefore, is to look into the conduct of Mr. *Lowe*, to see whether he provoked Mr. *Bland* to do that which he did; and referring to Mr. *Lowe's* conduct, the Court could only look to the report of the speech complained of, and referred to in the letter. From the letter it was clear the whole provocation was contained in the report of the *Herald*. The learned Judge said he quite concurred in what had fallen from the Solicitor-General, as to the privilege of a member being confined to what was really in

(3) *Lofft*, 394. (4) 7 A. and E., 277. (5) 1 Q. B. 486. (6) 4 Moore's P.C.C., 63.
 (7) 2 Lord Raymond, 1029. (8) Res. Judg., and *ante*, p. 351.

1849. debate, for the purposes of the debate. His privilege of speech, as was also said, extended no further than that of a barrister. To maintain that privilege inviolate was of the highest importance of all. His Honor then said he had read the report in question, he found the debate was about the University, and he found that the Bill dropped, so that it was likely the question as to the proposed University would be again brought forward. From a careful perusal of that report, he was of a deliberate opinion, that, in it Mr. *Bland* had no just cause of offence whatever. In making this remark he had no hesitation in doing so. The debate turned upon a principle of vital importance to this colony, and to the proposed University, viz., whether persons who had been transported to this colony were eligible to be on the senate. That question was fairly debated, it was argued by Mr. *Lowe*, as a question of principle, and no particular reference was made to Mr. *Bland*, nor was his name mentioned. His Honor then read two or three passages from the report. It was to be regretted, however, that the word convict was used in the last sentence. With the report, he repeated, Mr. *Bland*, in his Honor's judgment, had no just ground or reason to find fault. It certainly afforded no provocation to Mr. *Bland* to write the letter he sent to Mr. *Lowe*. His Honor said he, from the Bench, could only recognise Mr. *Bland*, for the purpose of the debate, as one of those who came to the colony as a convict. Off the Bench, he had the highest esteem for him, for his very good qualities; he knew that his case was a peculiar one, and had been distinguished from others by society here. His subsequent career in the colony entitled him to perfect oblivion and forgiveness for the past. Then as to the letter written by Mr. *Bland*, it may have been written hastily, but still to his Honor's mind it was one of the grossest and most improper ever penned; it was written too in the absence of provocation, it was wholly inexcusable. Judging of the letter, according to the maxim that the objects of the acts of a man must be judged and construed according to their natural probable result, it must be intended that Mr. *Bland* in writing the letter did so with the intention to incite Mr. *Lowe* to commit a breach of the peace. That intention may be looked at in two ways, first, that the writer intended him to fight a duel, or if not that, yet, considering the very galling and insulting nature of the letter, Mr. *Lowe* might be induced to commit a breach of the peace by assaulting him. Either of these two would be sufficient. His Honor said he was further of opinion that the intention of the letter was also to deter Mr. *Lowe* from ever again daring to mention his (Mr. *Bland's*) name in connection with the University Bill. It must be remembered that the Bill had dropped, but it was more than likely that the debate would be

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renewed. This question was of deep importance—important to all classes, for all equally had an interest in supporting the due and proper freedom of speech in the Legislative Assembly. Without it there was an end of whatever liberties we might possess. It was of the utmost importance that every member of Council should enjoy and exercise the right of expressing his honest opinion on every subject without being exposed to gross and flagrant insult. If the Court should not protect men under such circumstances, they would take the law in their own hands, and blood would be shed. Mr. *Lowe* had, therefore, done quite right in making this application. In conclusion, His Honor said, that having stated the principles on which the Court acted in cases of this kind, and having mentioned the view he took as to the apparent intention with which Mr. *Bland's* letter had been written, he, the Chief Justice, had only now to state the conclusion to which he had arrived with reference to this rule. Whether Mr. *Bland*, in writing that letter, had been guilty of writing it with the apparent intentions just mentioned, depended upon the intentions actually passing in his mind at the time. Now, Mr. *Bland* and Mr. *Wentworth* both negatived, in terms as plain and positive as can be, those intentions. To conclude, therefore, now, in the face of those affidavits, that the letter was written with the intention to incite a commission of a breach of the peace, would be arriving at a conclusion most grievous to Mr. *Bland*, imputing to him perjury, neither more nor less; and as the oaths of Mr. *Bland* and Mr. *Wentworth* ought to be accredited, the rule must therefore be discharged. His Honor said, he deeply regretted that Mr. *Bland* and Mr. *Wentworth* in their affidavits had repeated the insult, by going out of their way to inflict insult by imputing to Mr. *Lowe* acts of cowardice. Such a course could not be extenuated; it was highly reprehensible. Considering, however, that the letter was written without the slightest provocation, that the terms used in it were most gross, ungentlemanly, and insulting, that the insult was repeated and greatly aggravated by Mr. *Bland's* subsequent conduct, a course persisted in up to the last moment, and considering that Mr. *Lowe* was entirely absolved from the imputation of having given any the slightest provocation, and that but for the affidavits filed in reply, he would have had the rule made absolute, His Honor was of opinion that the rule, although discharged, must be discharged without costs.

Mr. Justice DICKINSON said that he agreed with the Chief Justice in the conclusion as which he had arrived, and substantially in the observations he had made. He would only add, assuming (for the sake of argument) that the principle contended for by Mr. *Lowe* respecting the

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1849. constitution of the senate was valuable, he thought its assertion would
REGINA have been more satisfactory, had Mr. *Lowe* specifically excepted Mr.
v. *Bland*, and the circumstances of his former offence from any unpleasant-
BLAND. ness attendant upon the argument, obvious as it is, that the offence of
Dickinson J. Mr. *Bland* never did, or ought to have excluded him from the society
and station of men of honor, countenanced, *most erroneously*, as that
kind of offence has ever been by persons of reputation, and practised
as it had been by many most distinguished individuals. But, on the
other hand, it is natural to expect that in the haste and excitement of a
debate, some qualification of a position may sometimes not be so pointedly
expressed as the speaker might have intended.

Mr. Justice MANNING said he concurred in the general result arrived
at by the *Chief Justice*, but would rather concur with Mr. Justice
Dickinson in his observations with regard to the report itself.

Rule discharged, without costs.

GILCHRIST v. DAVIDSON. (1)

1849.

Conflict of laws—Promissory note invalid by English law—Stamps—Foreign revenue laws.

Nov. 14.

Stephen C.J.
Dickinson J.
and
Manning J.

The question was whether a promissory note, made in England, and insufficiently stamped, as appeared by 55 Geo. III, c. 184, and therefore avoided by 31 Geo. III, c. 25, was admissible in evidence in this Colony.

Held, on the authority of *Alves v. Hodgson* (2), that the Colonial Court should give effect to the revenue laws of Great Britain;

Also, (*per* the Chief Justice and Manning J.) the instrument could not be dealt with as valid here, on the broader ground that in the country, where it was made, it was inoperative and invalid.

MOTION for a non-suit on leave reserved. The judgment of the Court in this case was delivered by—

The CHIEF JUSTICE: This was an action by the indorsee of a promissory note, made by the defendant in London, tried before Mr. Justice Dickinson. The plea was, simply, that the defendant did not make the note; but the defence in fact was, that it was on an insufficient stamp. His counsel referred to the English Statute Book, containing the 55 Geo. III, c. 184, by which the amount of the stamp clearly appeared to be deficient. He produced in like manner the 31 Geo. III, c. 25, and relied on sections 8 and 11 of the former, and on s. 19 of the latter Act. No objection was taken, for the plaintiff, to the mode of proving the two statutes, but it was contended that, as they affected persons and things in England only, and related exclusively to purposes of revenue, this Court would not take any notice of them, England being, as to such matters, when the contract was sought to be enforced here, a foreign country. The language of the statute, moreover, was dwelt on, as showing that the instrument, or contract, was not made void, but merely that the former could not be given in evidence. This, it was urged, was a matter relating to the remedy, and the mode of proceeding, and so was governed by the *lex fori*, not that of the place where the instrument was made. His Honor being of that opinion, so directed the jury, but he reserved leave to the defendant, to move for the entry of a nonsuit.

Mr. Michie moved accordingly, in the last term, when the arguments for the plaintiff were renewed. Mr. Broadhurst insisted further, that

(1) *The Sydney Morning Herald*, Oct. 13, Nov. 17, 1849. (2) 7 T.R. 241.

1849. the defence ought to have been specially pleaded. The following cases
 GILCHRIST were cited :—*Alves v. Hodgson* (3) ; *Clegg v. Levy* (4) ; *Story Confl. Laws*,
 v. s. 556 and 260 ; *Anner v. Clark* (5) ; *Fenwick v. Laycock* (6) ; *Field v.*
 DAVIDSON. *Woods* (7) ; *Dawson v. McDonald* (8) ; *Steadman v. Duhamel* (9) ;
 Stephen C.J. *Trimbey v. Vignier* (10) ; *Huber v. Steiner* (11) ; *De La Vega v. Vianna*
(12) ; *Battersby v. Kirk* (13) ; *Sm. Merc. Law*, 198 ; and the case of
Walker v. Appleton (14) in this Court, in July, 1838.

We are all of opinion, that, supposing the defence here to be sustainable, it need not have been specially pleaded. The rules of pleading in assumpsit are the same in this Court as at Westminster ; and by them, no doubt, all matters which make a contract void, or voidable, must be pleaded. But the words of the statute are, that no bill or note (not being duly stamped) shall "be pleaded, or given in evidence in any Court or admitted in any Court to be good or available." Now it is fairly debateable, whether that provision should be enforced in this Court ; but, if enforced, the mode of doing so will be the same as in the English Courts. The proper plea there, it is admitted, is *non fecit*, for the plaintiff is then prevented, by force of the enactment, from proving that the defendant did make the note. And, for the same reason, the statute will (if at all) so operate here.

Whether a colonial Court can judiciously notice the English statute book, when it relates to matters wholly foreign to the Colony, we are now called on to determine. As the case stands we must take it as established, that the note declared on was not duly stamped ; and that, for that reason, it could not be given in evidence, or admitted to be good or available, in any Court in England. The question is, whether nevertheless such an instrument be or not admissible in evidence here. There are authorities to support the position that if England can be considered a foreign country as to such a matter, the note declared on in this case would be so admissible. But, whatever may be the law on that question, we are all agreed that *Alves v. Hodgson* (15) independently of any other authority, is a distinct decision that the English Courts, on an objection to the validity of a contract in a British Colony, will give effect to the revenue laws of that colony. It seems to us, therefore, that, resting the case on that ground alone, the same respect must *à fortiori* be extended to the revenue laws of the parent state. To the

(3) 7 T. R. 241. (4) 3 Camp. 166. (5) 2 C. M. & R. 468. (6) 1 Q. B. 414.
 (7) 7 A. & E. 114. (8) 2 M. & W. 26. (9) 1 C. B. 888. (10) 1 Bing. N. C. 159.
 (11) 2 Bing. N. C. 202. (12) 1 B. & Ad. 284. (13) 2 Bing. N. C. 584. (14) No
 reliable report. (15) 7 T. R., 241.

same effect is the judgment of this Court, pronounced by Sir *James Dowling*, in the case of *Walker v. Appleton*, in which, indeed, the circumstances were more in favour of the claim, as the contract, though made in England, was to be performed in this Colony.

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Mr. Justice *Dickinson*, without expressing any opinion on the points to which I am now going to refer, desires to rest his concurrence in this judgment exclusively on the case of *Alves v. Hodgson*, and on the comity which, we all agree, is due to the laws of a country, which (according to that case) recognises our own. Mr. Justice *Manning* and myself are of opinion, however, that the decision may be put on a broader ground. According to Mr. Justice *Story* (*Confl. of Laws*, sections 237 to 243, and 260 to 262, inclusively), for which he cites numerous well-known authorities, contracts which are void or illegal, by the law of the place of the contract, are held void and illegal everywhere; and that law governs equally in everything "which concerns the proof and authenticity" of the contract, or "which regards its solemnities or formalities," or its "intrinsic and substantive form." In section 260 he says: "All the formalities, proofs, or authentications of contract, which are required by the *lex loci*, are indispensable to their validity everywhere else." Then, after citing several foreign jurists as to this doctrine, he adds: "And it seems fully established in the common law. Thus, if by the law of a country a contract is void, unless it is written on stamped paper, it ought to be held void everywhere, for, unless it be good there, it can have no obligation in any other country." The learned author has similar passages, in his work on promissory notes, sections 155 and 158. Now we regard the language of the English Stamp Act as, in effect, while the instrument remains unduly stamped, making such instrument void. It is, if not duly stamped, not admissible in evidence, nor can it be received as good, or valid, in any Court. In other words, such an instrument is in that state inoperative and invalid, in the country where it was made; and how, therefore, consistently with the authorities, can it operate or be dealt with as valid in any other country?

It appears to me after a careful examination, that the only decision utterly irreconcilable with *Alves v. Hodgson* (16), is that of the Vice-Chancellor in *Wynne v. Jackson* (17), in which the point was but slightly noticed, and no authority on it was cited on either side. According to the report, Sir *John Leach* does certainly hold, that the informality of

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the bills according to the law of France, where they were drawn, was no objection to a recovery on them in an English Court. It may possibly be, that, because of the bills having been given in substitution of other and valid bills drawn and accepted in England, and of the acceptors seeking on independent grounds, to restrain an action on them, he was not entitled to avail himself of the informality, in that suit. But, in the unqualified terms in which the doctrine is propounded, it is an authority which seems unsupported by any other; and Mr. Justice *Story* speaks of it, as opposed to all principle. (*Conf. Laws*, 2d. ed., p. 341, note 1). As to *James v. Catherwood* (18), it merely decides that a receipt, given in France for money lent, and which was inadmissible evidence there for want of a stamp could nevertheless be given in evidence, as an acknowledgment of such loan, in the Courts of England. That was not the case therefore, of a contract: the question was, only, respecting the mode of proving the contract. But, here, the bill declared on itself the contract. The case of *Boucher v. Lawson* (19), and *Holman v. Johnson* (20), related to contracts perfectly valid in the country where made, but supposed to be invalidated by the circumstance, that the goods, which formed the subject of them, were to be smuggled into another country. It was in reference to that circumstance, that Lord *Mansfield's* observation, "no country ever takes notice of the revenue laws of another," was made, and the effect of that observation, therefore, so often quoted, has plainly been misunderstood. But, in *Clegg v. Levy* (21), Lord *Ellenborough* says:—"I should clearly hold that, if a stamp was necessary to render this agreement valid in Surinam, it cannot be received in evidence without that stamp here. A contract must be available by the law of the place where it is entered into, or it is void all the world over." To the same effect is the judgment of the Court delivered by Lord *Kenyon*, in *Alves v. Hodgson* (22). "This is a promissory note; and as it is not stamped, it cannot be received in evidence. It is said that we cannot take notice of the revenue laws of a foreign country. But I think we must resort to the laws of the country in which the note was made, and, unless it be good there, it is not obligatory in a court of law here." Now, the note in that case was made in Jamaica, in July, 1796. The English Stamp Act, containing the peculiar terms of invalidation which we have cited, was passed in the year 1791. And it is probable that the same phraseology was contained in the Jamaica law; for the objection was, that not being evidence in the country where made, the note could not be received in evidence" there.

(18) 3 D. & R. 190.

(19) Cas. temp. Hardwicke, 85.

(20) 1 Cowp. 343.

(21) 3 Camp. 166.

(22) 7 T. R. 241.

To the same effect is the case of *Trimbey v. Vignier* (23), where the distinction between objections *ad valorem contractus* and *ad modum actionis*, is clearly shown. By the law of France, the endorsement of a bill in blank confers no right of action on the indorsee, and the Court of Common Pleas held, therefore, that he could not sue in his own name anywhere else. So, in *Melan v. Fitzjames* (24), Chief Justice *Eyre* says, "It must be shown what the laws of France are, and that they create an obligation, which the laws of England will enforce. What would be a defence there, will be a defence here." In that principle, though Mr. Justice *Heath* differed as to its application in the particular case, the whole Court were agreed. There are many authorities to the same effect, from foreign jurists and others, cited in Mr. *Burge's Commentaries on Colonial and Foreign Laws*, vol. 3, cap. 20. And, finally, he sums up his observations as to the *lex loci contractus* thus. "The conclusion which may be deduced is that, if a contract had been made with those forms and solemnities, which would confer validity on it in the country in which it was made, it ought to receive effect in the country where it is the subject of suit. On the other hand, if, in consequence of a neglect of the solemnities and forms prescribed by the law of the country in which it was made, no effect could be given to it there, no effect can be given to it in any other country." 3. *Com. Col. Laws*, 764.

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On the whole, we are all of opinion that the Rule for a Non-suit in this case, must be made absolute.

Rule absolute for nonsuit.

(23) 1 Bing. N. C. 159.

(24) 1 Bos. & P. 141.

REGINA v. ROBERTS. (1)

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March 26.

Stephen C.J.
Dickinson J.
and
Therry J.

Bigamy—English Marriage Acts—marriage contract per verba de praesenti—26 Geo. II, c. 33, s. 18; 4 Geo. IV, c. 76, s. 33—5 Will. IV, No. 2—Presbyterian marriages—declaration—9 Geo. IV, c. 83, ss. 3 and 24—'reulm of Englands—'laws and statutes'—7 Will. IV, No. 6, s. 3.

The prisoner was married to C by a clergyman of the Church of England, and afterwards, in the lifetime of C, went through the ceremony of marriage with G, the officiating minister being a Presbyterian. A written declaration to the effect that one of the parties was a member of the Presbyterian Church, was not taken by the minister, as required by 5 Will. IV, No. 2, but it was proved that a verbal statement, that G was a member of that Church, was made by the prisoner. The latter was tried, and found guilty of bigamy.

Held: the prisoner's declaration to the minister, that G was a Presbyterian, was, as against himself, sufficient evidence of her being a member of the Church, called in the Act 5 Will. IV, No. 2, the Presbyterian Church of Scotland.

The second ceremony acquired no validity by the Act, 5 Will. IV, No. 2, because it was not accompanied by the written declaration, as thereby required (*Catterall v. Sweetman* (2) *followed*).

If the ancient English marriage law be in force in the Colony, (on which point the *Chief Justice* and *Therry J.* refused to give an opinion) the ceremony was invalid by that law. (*Reg. v. Millis* (3) and *Catherwood v. Caslon* (4) *followed*.)

The conviction, however, must be affirmed. (The Court assigned different grounds for the latter decision.)

(*Per the Chief Justice and Therry J.*) Even though a valid marriage would not, in any event, have been effected, the prisoner's entering into that ceremony amounted to that crime. (*Reg. v. Bacon* (5), and *Rex v. Penson* (6).)

(*Per Dickinson J.*) The second ceremony was a valid marriage *per verba de praesenti*. This marriage acquired no validity from the ceremony performed by the minister, but as the Act, 5 Will. IV, No. 2, contained no clause of nullity, it was not made void thereby. Nor was it avoided by the English Marriage Acts, 26 Geo. II, c. 33, s. 18, and 4 Geo. IV, c. 76, s. 33, these not being in force in the Colony. (*Rex v. Maloney*, 1836, *ante*, p. 74.)

The decision in *Regina v. Millis* was based on the law anterior to the Marriage Acts; which law, being founded on positive institutions (the Institutes of Edmund and of Lanfranc), is a portion merely of the *lex scripta*, or at any rate of the customary law, and is no part of the pure common law of England. This also is not applicable to the colony.

Marriages *per verba de praesenti* were not invalidated by the 7 Will. IV., No. 6.

As the British Senate has expressed one method, by which the Colonial Legislature shall declare the applicability of English law, viz. :—" by making ordinances

(1) *The Sydney Morning Herald*, Nov. 8, 1849; Jan. 5, March 30, 1850.
(2) 9 Jur. 951 and 11 Jur. 914. (3) 10 Cl. and Fin. 534. (4) 13 M. and W. 264.
(5) 1 Cox C. C. 33, and in 1 C. and K. 144, cited as *Reg. v. Brown*. (6) 5 C. and P. 412.

for that purpose" (7), the latter body is excluded from declaring such applicability by recitals in, or implications to be gathered from, ordinances made for other purposes.

The phrase "realm of *England*" (8) signifies that part of the United Kingdom called England; the word "laws," in the same section of the Constitution Act, must be construed to mean something different from the "statutes."

The facts in this case, as also the substance of the argument, appear in the judgment of the Court, which was delivered by their Honors separately.

The CHIEF JUSTICE. The important questions to which this prisoner's trial has given rise, came before the Court in December last, and were argued in the January vacation, on a special case stated by Mr. Justice *Dickinson*, by whom the points were reserved for decision, under the recent Act of Council. The prisoner was indicted for Bigamy. His first marriage in this Colony, to one *Catherine Cummins*, by a Clergyman of the Church of England, and her existence at the time of the alleged second marriage, were clearly proved. The sole question was, as to the validity of that second marriage; or, rather, as I shall have occasion presently to show, whether the ceremony performed on that occasion, and relied on by the Crown as a marriage, was sufficiently valid, or so far a ceremony of marriage, as to make the prisoner, by entering into it during the subsistence of the first, guilty in law of the crime charged upon him. This was, substantially, the question submitted to the Court by His Honor.

The Special Case states the evidence, as to the second marriage, to have been as follows. The Rev. Dr. *M'Garvie* proved, that he was an ordained minister of the Church of Scotland; and that that Church is a Presbyterian Church:—that the prisoner told him before the marriage, that *Elizabeth Goodwin* (the woman he was then about to marry) was a Presbyterian:—and that he, *M'Garvie*, then married those two persons, but without taking, from either of them, the declaration in writing required by s. 2 of the Act of 5 Will. IV, No. 2. On this evidence, the prisoner was under the Judge's direction found guilty, but His Honor reserved, in terms, the three following questions. First, whether there was sufficient evidence that Elizabeth Goodwin was "a member of, or holding communion with" (in the words of the enactment) the Presbyterian Church of Scotland. Secondly, whether the marriage with her was void, for want of the declaration mentioned in that enactment. Thirdly, whether on the evidence the conviction can be sustained, a

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(7) 9 Geo. IV, c. 83, s. 24.

(8) 9 Geo. IV, c. 83, s. 24.

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question, it will be seen, by no means involved in the other two, since, although the ceremony performed by Dr. *M'Garvie* may have been void, yet the conviction may still be sustainable. And it will be sustained, if that ceremony was nevertheless sufficiently efficacious, as against the prisoner, entering into it during his wife's lifetime, to constitute bigamy.

The case was argued before us, with great ability, by the *Attorney-General* and Mr. *Lowe* for the Crown, and Mr. *Holroyd* for the prisoner ; but I do not propose here to recapitulate their arguments, as, on account of the great interest which the questions excited, they have, after receiving the learned counsel's own revisal (except that of the *Attorney-General*), been already generally circulated. I need only mention the points taken, which were the following.

For the prisoner, it was submitted that the case of the *Queen v. Millis*, 10 Cl. and Fin. 653, followed by *Catherwood v. Caslon*, 13 M. and W. 264, was conclusive, that the presence of an Episcopally ordained Minister was essential, by the ancient law of England, to the validity of a marriage, in every country where that law prevails ; that it prevailed in this Colony, to the necessary exclusion of the Law of Scotland, or any other, since there could not be two systems contemporaneously in force in the same community :—that assuming both parties to the ceremony to have been Presbyterians, and immigrants from Scotland, as the Minister performing it was, yet they must be governed by the law of the Colony alone ; and that British subjects settling in a new country bring with them the laws of England, not of Scotland ; that at any rate, all doubt on the question (if any could otherwise have existed) is prevented by the 9 Geo. IV, c. 83, s. 24, which made all laws and statutes, then in force in England, equally in force in New South Wales, so far as the same could be applied here ; and that neither under that enactment, nor by the ordinary rules affecting the applicability of laws to Colonies, could it be maintained that a law, requiring the intervention of a clergyman at a marriage, was inapplicable, or not susceptible of application ; that, consequently, the prisoner's marriage by Dr. *M'Garvie*, a Minister not Episcopally ordained, was invalid, unless it were supported (as the decision in *Catterall v. Sweetman* showed, 9 Jur. 951, and 11 Jur. 914), but must stand or fall by the law in force before the 5 Will. IV, because the requirements of the Act had been neglected.

On the other hand, it was contended for the Crown, that the enactment requiring a written declaration was directory only : and so, that its omission did not invalidate, for which position the final decision in *Catterall v.*

Sweetman (9) was relied on ; that the ancient English law of marriage, ever since Lord *Stowell's* decision in *Dalrymple v. Dalrymple* (10), down to the recent case of the *Queen v. Millis* (11), was always understood to be, that a valid marriage was created by a *contract per verba de praesenti*, without the presence of any Clergyman ; and that the 5 Will. IV, No. 2, was declaratory of that state of the law ; that, although it must now be taken that the law was otherwise, and that an Episcopally ordained Minister in England, and places where the English law of marriage prevails, is alone enabled to confer validity on a marriage, yet the law of England in that particular never was in force in any Colony ; that this must be inferred, as to New South Wales at all events, from the language of the 5 Will. IV ; and that, in fact, in the earlier days of the Colony, there were no clergymen here of any denomination to perform the ceremony, or, at any rate (until a comparatively recent period), throughout tracts embracing an enormous extent of country ; that the law contended for could not be held to be in force, in such a state of things ; the law of nature, which governed that of marriage, being necessarily superior to any mere municipal provision, not expressly adopted by the community to be subjected to it ; that such a law, considering it even as a part of the Common Law (which his Honor Mr. Justice *Dickinson* had suggested that it was not), was not one which British subjects took with them to any Colony as a portion of the inheritance of Englishmen, seeing that it was a law neither "necessary" nor "convenient for them ; that, with respect to Scotchmen *they* held a peculiar position in such a matter ; since the Act of Union between the two countries, solemnly securing the rights of the Church of Scotland, and her Ministers, necessarily conferred on these the same privileges, in a Colony settled since the Union, as they possessed in Scotland :—but that, finally, even if the second marriage were void, and admitting that such a ceremony would not have been sufficient, had it been the *first* marriage contracted, it was (within *Penson's case* (12) and *Brawn's case* (13)) sufficiently efficacious to sustain the prisoner's conviction.

In answer to the last point, it was observed by Mr. *Michie*, that in the cases cited there was confessedly an authorised ceremony performed ; but that here the efficacy of the second depended exclusively on the 5 Will. IV, No. 2 ; and that as the declaration which that Act required had been omitted, the ceremony was wholly unauthorised, and so that *Penson's* and *Brawn's* cases and this were clearly distinguishable. He

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(9) 11 Jur. 914. (10) 2 Hag. Consis. R. 82. (11) 10 Cl. & Fin. 653.

(12) 5 C. & P. 412. (13) 1 Cox C.C. 33.

1850. submitted that the ancient Marriage Law of England, however it may
 REGINA have been enforced or promulgated by King Edmund, or by the Eccle-
 " siastical Synod under Archbishop Lanfranc, was strictly a part of the
 ROBERTS. Common Law ; that the King's Ecclesiastical Law was always so
 Stephen C.J. regarded ; and that every part of that Law, though he admitted it to be
 otherwise with respect to the Statute Law, whenever it could be applied
 in a Colony, was at once in full force and operation there.

In addition to the cases already mentioned, that of the *King v. Maloney* (14) in this Court, 11 February, 1836 ; the Newfoundland Marriage Act, 57 Geo. III, c. 51 ; the East India Presbyterian Marriages Act, 58 Geo. III, c. 84 ; *Hale's Hist. C.L.* 88 ; *Fielding's case* (15)—also 2 *Kent's Com.* 86 ; *Alison's Crim. Law*, tit. Bigamy ; *Rex v. Birmingham* (16), and other authorities, were referred to. And I have myself since the argument, consulted the following, which I mention, as they may be useful on some future occasion. *Com. Dig. Parliament R.* 4 ; *Vin. Ab.*, vol. 17, p. 224, *et seq.*, title Prerog. Eccles. Laws ; the Colonial Act 7 Will. IV, No. 6, s. 3 ; *Burge's Col. Law*, 154, 159 ; *Hale's Hist.* 1, 4, 8, 12, 54 ; 1 *Reeve's Eng. Law*, 215, 217 ; *Turner's Anglo Saxons*, 71, 191, 202, 212, 221 ; (and see *Palgrave's Anglo Saxons*, 189, 2, 9) ; Collection of Anglo-Saxon Laws, p. 108, 109, Laws of Edmund, A.D. 944 ; and *Wilkin's Concilia*, 215, 217, and Synod. Winton, 1076 ; *Chalmer's Coll. Opin. Em. Law*, 195, 197, 203, 213, 220 ; *Clark's Colonial Law*, 8 and 9 ; *Bac. Ab. Statute* ; *Caudrey's case* (17), and the following Acts of Parliament—St. Petersburg Marriages, 4 Geo. IV, c. 67 ; Marriages in Chapels abroad, 4 Geo. IV, c. 91 ; Newfoundland Marriages (repealing the 57 Geo. III), 5 Geo. IV, c. 68 ; Quaker's Marriages, 6 and 7 Vict., c. 85, s. 2.

As my colleagues and myself are not prepared to deliver a unanimous judgment on all the questions involved in this case, it has been a matter of very anxious consideration with me, how far I ought to express an opinion on one of them ; to which the learned Judge who tried the case, in the view which he takes of the matter, has felt it necessary chiefly to address himself. And, after conference with my brethren, I have finally determined that, on that question, having arrived at a conclusion which, so far as I am concerned, renders its solution unnecessary, it is my duty to be silent. I have simply to decide, whether the prisoner's conviction can be supported ; and, being of opinion that it can, even if the ceremony performed by Dr. *McGarvie*, in point of law, be invalid, I clearly need

(14) *Ante*, p. 74. (15) 14 St. Tr. 1327. (16) 8 B. & C. 29. (17) 5 Rep. 6.

advance no farther. It is, no doubt, of very great importance to many families and individuals, that a question on which depends the validity, as I have been informed, of a large proportion of the Presbyterian marriages celebrated in this Colony, and consequently the legitimacy of children, whose parents have been united without observance of the prescribed forms, should be speedily and permanently settled. It is not possible, however, under existing circumstance, for any less authority than that of the Legislature, to dispose of that question; and to the wisdom and humanity of that body, and their sense of what is due to a numerous class of Her Majesty's subjects, having natural and political rights every way equal to those of any other, it may safely and best be entrusted. At present, if the ancient Marriage Law of England be not in force in this Colony, every parent, every lover of decency and order, may well tremble. The status of the Presbyterian Clergy will, indeed, be in one sense secure; for they will be entirely on an equality, in respect of the power of celebrating marriages, with their Episcopalian brethren; but both, to borrow an expression used during the argument, will be reduced to that of the postman or the blacksmith. It will no longer be a question, to what religious denomination shall the officiating Minister belong, but how shall we escape the evils of hasty contracts, in a matter vitally important to the general welfare, which, once made, though unchecked by the necessity of resort to a Minister of any denomination, or the interposition of any other prudent delay, however short, will be irrevocable even by the subsequent assent of both parties. I shall not be thought to have exceeded much my province, I trust, by drawing attention to these things; or by expressing the hope that, whatever course may be sanctioned as to the mode of celebration in other respects, care will be taken to prevent the recurrence of such instances of stolen and hurried matches, and occasionally of very young girls (not unfrequently celebrated, too, in a private dwelling, and at night), as those which more than one recent Criminal case have shown to be quite possible, under the existing system.

We are all agreed on the first question, that the prisoner's declaration to Dr. *McGarvie*, that *Elizabeth Goodwin* was a Presbyterian, was, as against himself, sufficient evidence of her being a member of the Church, called in the Act of 5 Will. IV, the Presbyterian Church of Scotland. It is very true that the expression was not a very conclusive one; for the woman may have been a Presbyterian, and yet not of the Church of Scotland. It is true, also, that the "Presbyterian Church of Scotland" is a singularly loose phrase, and indeed an inaccurate one, for there are in Scotland, and were at the time of the passing of the Act, several

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1850. Presbyterian Churches ; and if the *established* Church of Scotland were meant, that was (as in the East Indian Marriage Act) the appropriate term to have been used. There are, however, I presume, and were at the time, many Presbyterians in the Colony, not connected with that or any other Scottish Church. But, be this as it may, I think that the prisoner's application to a Minister of the established Church of Scotland, to marry him to the woman there then present, and his declaration to that Minister that she was a Presbyterian, furnish sufficient evidence against the prisoner, that he meant that Minister to understand that the woman was of the Church, whose members it was lawful for the Minister to marry. And, if such was the meaning the prisoner intended to convey, he cannot be permitted to withdraw it, if the fact be otherwise, by taking advantage of his own fraud. For this, *Allison's case* (18) appears to be a distinct authority.

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Here, then, is this prisoner applying to Dr. *M'Garvie*, an ordained minister of the Church of Scotland (and, therefore, a person clearly entitled to marry members of that Church, whatever *other* Presbyterian ministers might be entitled to or not entitled to do), and declaring the woman he seeks to marry to be a member of that Church. Dr. *M'Garvie* thereupon, but without pursuing the course pointed out to him by the law, celebrates the ceremony of marriage between the prisoner and that woman. The question is, whether the prisoner's entering into that ceremony (he having a wife living at the time), though in any event void, as a marriage, and such as would equally have been void, whether he was previously married or not, both of which, of course, are assumptions, necessary to the debate of the question, constituted an act of bigamy. And I am of opinion that, even though a valid marriage would not thereby, in any event, have been effected, his entering into that ceremony did amount to that crime.

It is unquestionably essential, to constitute this offence, that the *first* marriage should be a valid one ; for, if there be no such subsisting marriage, or existing legal wife, the second ceremony would take effect, and so, clearly, the crime could not have been committed. But, as to the second, there is no sufficient reason for the perfect validity of that marriage. Accordingly, in *Maloney's case* (19), in *Mill's* (20), and all the others of which I have any knowledge, in which the question of validity was raised, the marriage in contest was the first, and not, as here, the second ceremony. With respect to the *second*, if the first ceremony was binding, it is void in any event ; the validity of the second,

(18) *Russ. & Ry.* 109.

(19) *Ante*, p. 74.

(20) 10 Cl. & Fin. 653.

therefore, is comparatively of no moment. To this effect is the decision in *Baum's case* (21). There, the second marriage was absolutely void, by statute, "to all intents and purposes," by reason of affinity between the parties. But Lord *Denman* held that to be sufficient to constitute the crime, saying—"I am of opinion, that the validity of the second marriage does not affect the question. It is the appearing to contract a second marriage, and going through the ceremony, which constitutes the crime of bigamy." So, in *Penson's case* (22), where the question also was, as to the effect of the second ceremony. It was clearly invalid by the Marriage Act, the woman having been married and the banns published in a name totally different from any by which she had ever been called or known. But, on the objection being taken that the offence of bigamy could not have been committed because of that invalidity, Baron *Gurney* said—"That applies only to the first marriage," and he added (what, indeed, was unnecessary to the decision), "I am of opinion, that parties cannot be allowed to evade the punishment for an offence, by contracting a concertedly invalid marriage." It would clearly seem, on principle, and on the authority of *Baum's case*, that the offence would equally exist, whether the prisoner meant the ceremony to be invalid or not.

It is true, that in *Penson's* and *Baum's* cases the ceremony was confessedly, by a Minister duly authorised. But so, I conceive, was Dr. *M'Garvie* here. One of the persons applying was a member of his Church, and he was entitled, therefore, to marry them. Or, more correctly speaking, for on the assumption that the ancient English law was in force, he or any other Minister might still, by that law, perform the ceremony of marriage, Dr. *M'Garvie* was enabled to confer validity on a marriage celebrated by him between those persons. But, on the same assumption, the ceremony or marriage would be valid, only, if substantially in accordance with the provisions of the Local Act; and we are all agreed, that it was not substantially in accordance with those provisions, and, consequently, that (so far as *they* affect the question) the second ceremony was invalid. It was still, however, a marriage ceremony; performed by a Clergyman, authorised, as an ordained Minister of the Church of Scotland, to perform one between the parties. What rendered it invalid? Simply, the omission on Dr. *M'Garvie's* part (for I think it was *his* omission), to obtain the written declaration which the Act requires. No such marriage is, by the proviso in section 2, to be solemnised until one of the parties shall have signed a declaration that

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(21) 1 Cox, C. C. 33.

(22) 5 C. & P. 412.

1850. he or she is a member of, or in communion with, the Church of the
 REGINA Minister celebrating it. For the want of such a declaration, there is no
 v. validity conferred by the Act on the marriage. The performance of the
 ROBERTS. ceremony, without that declaration, may even have been criminal. But,
 Stephen C.J. if the marriage was for the cause assigned a void one, in what does the
 invalidity differ substantially, from that which existed in *Penson's case*?
 The marriage ceremony there was illegal, for no banns had been pre-
 viously duly published. In *Baum's case*, it was wholly void to all
intents and purposes by the express terms of the 5 and 6 Will. IV., c. 54.
 Yet, in each of those cases, the marriage having (as here) been a second
 one, it was holden to be sufficiently efficacious to sustain the charge of
 bigamy.

I can see no sufficient distinction between either of those cases, and
 the present, to warrant a different conclusion. In each, as it seems to
 me, the ceremony of marriage was, as such, and in itself, a valid one.
 The declaration here would have added nothing to the ceremony, and
 its absence subtracted nothing from the ceremony. The ceremony, as
 such, was complete as it stood. The declaration was incidental, only, to
 the *value* of the ceremony, a question with which, according to both
 cases, the prisoner's guilt has nothing to do. By going through that
 ceremony, and appearing thereby to contract a binding union, he
 obtained possession of a woman under pretence of making her his wife.
 Had the proper declaration been signed, his crime could not have been
 the greater. The pretence would have been the same; and the marriage
 with her, pending the first, could have been no more made valid, than it
 has been or is now.

There is a passage in the opinions of the Judges in *The Queen v. Millis*
 (23), which seems to derogate from the authorities relied on by me. The
 words of the statute against Bigamy are, "If any person being married,
 shall marry any other person," &c. Lord Chief Justice *Tindal* says, that
 these words *being married* and *shall marry* must, of necessity, "point
 out and denote marriage of the same kind and obligation." Whence he
 goes on to observe, "If, therefore, a marriage *per verba de praesenti* with-
 out any ceremony, is good for the first marriage, it is good also for the
 second. But it never could be supposed, that the Legislature meant to
 visit, with the severe punishment allowed by law the man who had in
 each instance entered into a contract *per verba de praesenti*, and nothing
 more." It will be seen that there is no portion of this, in terms, incon-
 sistent with *Baum's* and *Penson's* cases. And I do not conceive that

there is, in effect, any inconsistency intended. The opinion expressed is, that a mere contract of present marriage, twice entered into, would be insufficient to sustain a charge of Bigamy; but that, if such a contract would be sufficient for a *first* marriage, it would be equally so for the second. Neither of these positions will be questioned. But it is not said, nor do I conceive it was meant to be said, that because the first marriage must be a perfectly binding one, therefore the second must be so. It was not necessary to the case, to lay down any such rule; and such a rule would not only be opposed by the cases of *Person* and *Bawn* (which have never yet been otherwise questioned), but would be unsupported by any assigned reason, or any which can be found in any of the cases on the subject. The utmost which the words can reasonably be understood to mean, when taken in connection with the context, is this: that, if a mere contract would suffice for the first marriage, it would clearly suffice for the second; but that, if a Religious ceremony was required for the one, it would equally be so for the other; and the Chief Justice inferred, that such a ceremony was supposed by the Legislature to be necessary alike in both. Thus understood, the argument used is quite intelligible. But whatever was intended, the sentence amounts to a bare dictum, certainly not over-ruling, nor in my opinion impairing, either of the decisions, on which I rest this judgment.

On this point, and in these views, I am permitted to say that the Resident Judge at Melbourne, Mr. Justice *A'Beckett*, with whom I have had the advantage of corresponding on the question, concurs with me.

It will be convenient, that I should here state the result of the opinions arrived at by my Colleagues and myself in this matter. We are all agreed that, according to *Catterall v. Sweetman* (24), the decision in which is adopted by us, the ceremony performed by Dr. *M'Garvie* acquired no validity by the Act of 5 Will. IV., because of its not having been accompanied by the written declaration, mentioned in that Act. We all agree that, if the ancient English Marriage Law be in force in this Colony, the ceremony was invalid by that law, because of Dr. *M'Garvie's* not possessing Episcopal ordination, the only one known to that law. On this, indeed, the decisions in *The Queen v. Millis* (25), and *Catherwood v. Caslon* (26), leave us no discretion. It appears to have been supposed that Sir *Stephen Lushington's* final judgment in *Catterall's* case, in decreeing for the divorce, determined in effect that the marriage there was valid. But that learned Judge decided, only, in substance, that it was *prima facie* or to a certain extent valid. He held it so far to

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be valid, in that Court (regarding it there as a *de facto* marriage, good by the Canon law) as to justify a Decree for that divorce, which was one *à mensâ et thoro* only. The invalidity of the marriage, under the local Act, was not doubted; but, to support such a decree, he held that a perfectly valid marriage was unnecessary. The question, therefore, whether the ancient English Law, which would equally have invalidated the marriage, was in force in New South Wales, became immaterial.

That is the question, on which I abstain from offering an opinion here. Mr. Justice *Therry*, it will be seen, takes the same course. Mr. Justice *Dickinson*, on the other hand, not being able to rely entirely on *Baum's* and *Penon's* cases, enters fully into that question, arriving finally at the same conclusion, with Mr. Justice *Therry* and myself, as to sustaining the prisoner's conviction, but on very different grounds. The question whether the English Marriage Law extends to New South Wales, depends in no small degree on this, whether the Law is, or must be taken to be, part and parcel of the Common Law, or that which is or can be regarded as such. For, as it would seem, in a new-settled country, the former is supposed always to accompany English subjects, but the latter, only when and so far as the particular provision, whatever its nature, may be suited to their local position and circumstances. These are all in this Colony, and especially in this case, questions and topics of great interest, and I should have felt pleasure in devoting myself to their examination, were I not restrained by the consideration already mentioned by me, that, under the circumstances, it would on my part be wholly extrajudicial and uncalled for.

DICKINSON, J. In delivering my opinion on the important point of law which has arisen on the trial of this prisoner, I shall be under the necessity of urging several topics, and advancing various views, which have heretofore been treated with the greatest ability by persons of national, if not universal, celebrity.

But as the duty has (as I think) been cast upon me to deliver my sentiments, upon a question whereon great men have widely differed, I shall claim no indulgence for the inferiority of my attainments and position, to those of the noble and learned personages who have discussed this question in England and in Ireland; but in the discharge of my function as a Judge of this Court, upon all the diligence and consideration I have been able to bestow upon this great question, I proceed without regard to the situation of the prisoner, or to the status of any individuals in the colony, to exhibit my view of the Law of Marriage in New South Wales.

From the special Case reserved under the late Act, 13 Vic., No. 8, it appears that the prisoner, having been married by a clergyman in the Church of England, afterwards, and while his wife was living, intermarried with another woman ; on which occasion a marriage ceremony was performed, according to the rites of the Church of Scotland, by the Rev. Dr. *M'Garvie*, a Clergyman of that establishment ; but neither the prisoner nor the last-mentioned woman ever made the declaration required by the Colonial Act 5 Will. IV, No. 2, whereby it was enacted that "all marriages between persons, both or one of such persons being members or a member of, or holding communion with, the Presbyterian Church of Scotland, or the Roman Catholic Church respectively, and making a declaration to the effect hereinafter mentioned, which marriages shall be had and solemnized within the colony by an ordained minister of the Presbyterian Church of Scotland, or by a priest or minister of the Roman Catholic Church, duly empowered by his proper superior respectively, shall be, and be adjudged, esteemed, and taken to be of the same force and effect as, and no other than, if such marriages were had and solemnized by clergymen of the Church of England ; provided always, that no such marriage shall be had and solemnized, until both or one of such persons, as the case may be, shall have signed a declaration in writing, in duplicate, stating that they, or he, or she, as the case may be, are or is members, or a member of, or hold communication with, the Presbyterian Church of Scotland, or the Roman Catholic Church, respectively."

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Upon this state of things, the first question which arises is, whether the prisoner can be subjected to the legal penalties for Bigamy, unless his second, (with reference to the ceremony thereof,) but for the existence of his former marriage, would have been valid? *The Queen v. Bawm* (27), and also the several decisions, *Queen v. Penson* (28), *Queen v. Alison* (29), *Ree v. Edwards* (30), *Reg. v. Orgil* (31), and *Jones v. Robinson* (32), are authorities, that the offence of Bigamy consists simply in a married person marrying another during the life of the former husband, or wife, and is not affected by the consideration whether such a marriage would have been legal or illegal on other grounds.

These cases were cited and argued on with great force by the Counsel for the Crown ; and as at present advised they appear to me almost decisive of the question. But I fear to rest my opinion upon them alone, as each of those cases differs from the present in this, that in each of them the second marriage was performed by a clergyman authorized by the laws

(27) 1 Cox C.C. 33.

(28) 5 C. & P. 412.

(29) Russ. & Ry. 109.

(30) Russ. & Ry. 283

(31) 9 C. & P. 80.

(32) 2 Phillimore 285.

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and statutes of England, to celebrate marriages, upon such representations being made, and acts done, as appear to have taken place under the circumstances of those cases respectively, and in neither of which had the clergyman notice, or means of knowledge, of the falsehood practised on him. But in this case it was in a very able argument contended by Mr. *Michie*, for the prisoner, that the offence of Bigamy was not committed, because the prisoner was not shown (as in the last-mentioned cases) to have made any false representation, which deceived Dr. *M'Garvie* into exercising any pre-existing clerical functions, but only that the prisoner did not make the declaration, which was necessary to invest the reverend gentleman with the specific authority to celebrate the second marriage, inasmuch as the prisoner's declaration was neither in writing, as mentioned in the proviso contained in the 2nd section of the Colonial Act before mentioned, nor could it be made good by the prior part of that section as a verbal declaration, for it was a representation, not of *his own* communion with the Doctor's Church, but of the membership therewith of his second wife; that in each of the cases referred to, a clergyman was deceived into the performance of a general duty, whereas Dr. *M'Garvie* assumed the power of marrying, without taking the representation from the prisoner, which he was aware was necessary to enable him to celebrate the second marriage; that in each of the cases referred to there was a marriage, but that in this case there was no marriage at all: that Dr. *M'Garvie* not being a clergyman in Holy Orders according to the Law of England, and not having observed the requisitions of the local Act, conferred no more efficacy upon the second marriage than if it had been celebrated by a layman.

As, therefore, the cases mentioned do not show whether the prisoner could have been legally convicted, if their respective second marriages had been celebrated by persons known to the parties not to possess (in a legal sense) the characters of clergymen, and as it is the validity of the ceremonial of the second marriage of the prisoner before us, upon which the necessity for our decision has arisen, it appears to me to be unadvisable to decide the case reserved, without expressing an opinion on the efficacy of the marriage ceremony, which was performed by Dr. *M'Garvie*. I also think that I act more safely in expressing such opinion, by reason of this sentence in the judgment of C. J. *Tindal* (in *The Queen v. Millis*) at p. 688 (33), "Now the words *being married* in the first clause, and the words *marry any other person* in the second, must of necessity point at and denote marriage of the same kind and obligation." The investigation

of that point may be expedient, moreover, for determining the validity of the former marriage by Mr. *Brigstocke*, and for ascertaining the principle on which marriages in this colony by clergymen of the Church of England are so binding, as to render a person, contracting a second, during the continuance of a marriage solemnized as that of the prisoner by Mr. *Brigstocke*, amenable to the penalties for Bigamy.

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Upon such circumstances, then, as these stated in the case reserved, we have the express decision of Dr. *Lushington*, 1st, that the second marriage acquired by the Act no validity, from the performance of the ceremony by Dr. *M^rGarvie*; and secondly, that as the Act contained no clause of nullity, the marriage was not made void by it. See *Catterall v. Sweetman* (34). That decision I think a most material step in the progress of our inquiry, as by it we may put the Act 5 Wm. IV, No. 2, out of consideration, and I confidently rely on the judgment of Sir *Stephen Lushington* in the last-mentioned case, first, on account of its reasonableness, secondly, on account of the great celebrity and talents of that right honorable and learned Judge, thirdly, because it is of the utmost importance that colonial courts should implicitly adopt the law as it is expounded in England. The next question therefore is, was the second marriage void by the Marriage Acts of England, 26 George II, c. 33, sec. 18; and 4 George IV, c. 76, sec. 33. With respect to those Acts, we have the decision of this Court in the case of *Rex v. Maloney* (35). "The prisoner, *John Maloney*, was tried for Bigamy in the Supreme Court. It appeared in evidence at the trial, that on the 19th December, 1829, the prisoner was married to *Mary Haly*, by a Roman Catholic Minister, according to the ritual of the Church of Rome, at the private residence of the minister, in the presence of two witnesses. It further appeared that the parties lived together for some time as man and wife, and had a family of children, that on the 4th September, 1835, the prisoner was married a second time to one *Mary Carmody*, according to the ceremonies of the Church of England, in the Protestant Chapel at Liverpool, his former wife being still alive, and residing in the colony."

Upon these facts the majority of the then Judges of this Court held, first, that there was no difference between the wording of the Statutes Geo. II and Geo. IV, which was material to the question before the Court. Secondly, that those acts are inapplicable to this colony, as the English legislature had virtually limited the enactments to Great Britain. And, thirdly, that the first marriage was good at the common law as *sponsalia per verba de praesenti*.

(34) 9 Jur. 951, [and 10 Jur. 914.]

(35) *Ante*, p. 74.

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Upon the last of these resolutions Sir *Francis Forbes* delivered his conclusion in the following words :—"By the ancient law or usage of marriage among the Christian states of Europe, before the decrees of the Council of Trent, and by the law of England, until the reign of King George the Second, the consent of two persons, able to contract, expressed in words of present mutual acceptance, technically known by the name of *sponsalia per verba de præsenti*, without the intervention of a priest, constituted an actual and valid marriage (37)."

I entirely agree, that the case of *Rex v. Maloney* is a decisive authority against the application to this colony of the English Marriage Acts therein mentioned, and I should have thought it also an authority that there may be in the colony a marriage valid by the common law of England *per verba de præsenti*, but that the case of *Dalrymple v. Dalrymple* (36), on which it was in some measure founded, has, by imposing authority, been considered no decision upon the latter point, and also that Lord Stowell's observations upon it were extra-judicial. Taking, however, his Lordship's observations to have been extra-judicial, they show the strong conviction of that great canonist and civilian, upon a question whereon he had evidently bestowed extreme thought; and his opinion, so far as it relates to natural law, is consistent with the decision in *The Queen v. Millis*, as I will now endeavour to explain.

Following implicitly the decisions of the English Courts, we must (on the authority of the Court of Exchequer in *Catherwood v. Caslon* (38) regard the way in which the case of *The Queen v. Millis* was dealt with as a decision, that by the law in England, for a long time anterior to the Marriage Act of Geo. II, the celebration of a marriage by a clergyman in episcopal orders was essential in England and Ireland to the validity of that contract.

Upon careful perusal and anxious consideration of the case of *The Queen v. Millis*, and referring more especially to the opinion of Lord *Cottenham*, I should (even were I not bound by it) have been satisfied beyond all hesitation, first, that it was a correct decision upon the law anterior to the Marriage Act; and, secondly, that that anterior law originated in the Institutes of Edmund and the Council of Winchester, referred to by Lord *Cottenham* (39). His Lordship's observations appear to me so conclusive, as to the grounds on which that decision must be supported, that I cannot, to make my own opinion intelligible, do better than to repeat them on this occasion.

(36) 2 Hag. Consis. R. 82. (37) [See 2 Hag. R. 82; 2 Salk. 437; 1 T. R. 99.]

(38) 13 M. & W. 261.

(39) 10 Cl. & Fin. at p. 877.

In discussing what was the law in ancient times concerning the solemnizing of marriage, his Lordship says: "It is highly important to ascertain what were the rules in this respect, by which the Ecclesiastical Courts in the country were regulated; for, as the jurisdiction of all questions of marriage has been exercised by the Ecclesiastical Courts, ever since their separation from the Civil Courts soon after the Conquest, the law of these Courts must have been at all times the law of the country." "The Institutes of Edmund direct, that in nuptials there shall be a mass priest, who shall, with God's blessing, join the parties together to all prosperity. And by the ordinance of a Council, held at Winchester in the time of Archbishop *Lanfranc*, A.D. 1076, it was declared that a marriage without the benediction of a priest should not be a legitimate marriage, and that other marriages should be deemed fornication; and many other provisions against clandestine marriages prove that such marriages were in fact celebrated by priests."

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In addition to this passage from Lord *Cottenham's* judgment, it is manifest from the opinion of C.J. *Tindal* (40), that he considered the marriage law anterior to Lord Hardwicke's Act to have originated in the institute of King Edmund; and such was also the opinion of C.J. *Pennefather*, as is apparent from the following extract from *Smythe and Bourke's* Report of the argument in the case *Reg. v. Millis*, before the Queen's Bench in Ireland. "Now what does this book of authority establish? Not that it was the opinion of A or B that it would be expedient or decent to have a priest present at the solemnization of marriage: but a positive law enacted by the King, with his Royal authority, and binding upon all the subjects of the kingdom from that time to this." (41)

The decision in *The Queen v. Millis*, I therefore humbly conceive to be an exposition only of the law anterior to the Marriage Act; which law, being founded on positive institutions, is a portion merely of the *lex scripta*, or at any rate of the customary law, and is no parcel of the pure common law of England.

The distinction, if correct, appears to me of great importance in the discussion of the question I am now considering; for it seems to have been considered, that though the applicability of the statute law of England to the circumstances of a colony must always be questionable till decided, the common law must necessarily be applicable to the

(40) At p. 682 of 10 Cl. & Fin.

(41) Reported in full in *Smythe & Burke's*, and *Dix's Reports of R. v. Millis*, and briefly in 4 Ir. L.R. App.

1850. condition of every dependency. The last-mentioned portion of the law
 REGINA of England no doubt must be applicable to every British colony, if it is
 v. (as its name implies) common to England and all other places.
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Dickinson J. The mode of declaring the applicability of English law to this Colony depends on the Imperial Statute 9 Geo. IV, c. 83, sec. 24, by which it is enacted "that all laws and statutes in force within *the realm of England* at the time of passing this Act (not being inconsistent herewith, or with any charter or letters patent, or Order in Council, which may be issued in pursuance hereof) shall be applied in the administration of justice in the Courts of New South Wales and Van Diemen's Land respectively, so far as the same can be applied within the said colonies; and as often as any doubt shall arise, as to the application of any such laws or statutes in the said colonies respectively, by and with the advice of the Legislative Councils of the said colonies respectively, by ordinances to be by them for that purpose made, to declare whether such laws or statutes shall be deemed to extend to such colonies, and to be in force within the same, or to make and establish such limitations and modifications of any such laws and statutes within the said colonies respectively, as may be deemed expedient in that behalf. Provided always, that in the meantime, and before any such ordinances shall be actually made, it shall be the duty of the said Supreme Courts, as often as any such doubts shall arise upon the trial of any information or action, or upon any other proceeding before them to adjudge and decide as to the application of any such laws or statutes in the said colonies respectively."

Several enactments have been made in this colony, from which it is evident that the Colonial Legislature was of opinion that all the "Laws and Statutes" of England relating to marriage were in force in this colony. But there has been as yet *no ordinance made expressly to declare* any of such "Laws and Statutes" applicable to the condition of New South Wales. As the British Senate has expressed one method, by which the Colonial Legislature shall declare the applicability of English law, viz., "by making ordinances for *that* purpose," the latter body is excluded from declaring such applicability by recitals in, or implications to be gathered from, ordinances made for other purposes. The Colonial Legislature not having as yet declared the applicability of the said laws and statutes, and the doubt having arisen during the trial, it has become the province of this Court, as I think, to decide on the aforesaid applicability.

And here it is necessary to dispose of an argument urged upon the Court, with great force and earnestness by the learned *Attorney-General*.

His argument was shortly this :—"Dr. *McGarvie* is an ordained minister of the Church of Scotland ; the marriage he celebrated was valid according to the law of that Church ; the religion of that Church is by the Act of Union acknowledged to be the true Protestant religion in Scotland ; New South Wales is a colony not of England, but of the United Kingdom of Great Britain and Ireland, the laws of which must be here regarded, as there was when the Statute 9 Geo. IV, c. 83, section 24, was enacted, no such realm as the "realm of England" therein mentioned, and therefore marriages, which in Scotland would be valid by the laws of Scotland, ought to be esteemed equally valid in this dependency."

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The foregoing, I conceive, however feebly I may have expressed it, is not an incorrect outline of the elaborate and learned argument of the *Attorney-General* ; an argument which would have caused me individually the greatest embarrassment, and might have engendered portentous questions respecting the applicability of Scotch law to this colony, but that I think we are relieved from the difficulty by construing the 24th by the 3rd section of the Statute 9 Geo. IV, c. 83, by which it was enacted "That the said Courts respectively shall be Courts of Record, and shall have cognizance of all pleas, civil, criminal, or mixed, and jurisdiction in all cases whatsoever as fully and simply, to all intents and purposes, in New South Wales and Van Diemen's Land respectively, and all and every the islands and territories which now are or hereafter may be subject to or dependent upon the respective Governments thereof, as His Majesty's Courts at King's Bench, Common Pleas, and Exchequer, at Westminster, or either of them, lawfully have or hath in England ; and the said Courts respectively shall also be at all times Courts of Oyer and Terminer and Gaol Delivery in and for New South Wales and Van Diemen's Land and the dependencies thereof respectively ; and the said Judges so appointed shall have and exercise such and the like jurisdiction and authority in New South Wales and Van Diemen's Land and the dependencies thereof respectively, as the Judges of the Courts of King's Bench, Common Pleas, and Exchequer, or any of them, lawfully have and exercise, and as shall be necessary for carrying into effect the several jurisdictions, powers, and authorities, committed to the said Courts respectively."

Now, though there was at the period of the passing the Statute 9 Geo. IV, c. 83, no such realm as the "realm of *England*" mentioned in the 24th section, yet as the Colonial Courts mentioned in the 3rd section are empowered to exercise the same jurisdiction as the Common Law Courts

1850. at Westminster, it appears to me to be quite clear, that by the phrase
 REGINA "realm of England" the Legislature intended to signify that part of the
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The case then being disembarrassed from the great difficulty suggested by the argument of the *Attorney-General*, I now proceed to consider Mr. *Lowe's* observation, that the words "laws and statutes" in the 24th section of statute 9 Geo. IV, c. 83, cannot be satisfied, unless "laws" are construed to mean something different to "statutes"—that "laws" must therefore be construed to mean the *lex non scripta*, or common law, over which latter this Court has therefore the same eclectic power as over the statute law, in deciding upon the applicability of it to this colony.

I agree with Mr. *Lowe* that "laws" must be construed to mean something different from "statutes," and that this Court must consider the applicability (when occasions arise) of all parts of the law of England to the circumstances of this colony; and it appears to me that of these "laws" a portion is necessarily applicable, because its existence has been discovered by reasoning, while other portions are as examinable as the ordinary statutes, because they were created by ordinances as arbitrary as the enactments from *Magna Charta* to this period. The Saxon constitutions mentioned by Lord *Cottenham*, and the decisions based on them, appear to me to be a portion of the "laws"; the applicability of which must be a question for the consideration of this Court, as they are really as much *leges scriptæ* as the ordinary statutes.

In taking this distinction, I am met at the threshold of my observations by Lord *Hale's* assertion, "lawyers have distinguished between statutes made before the time of legal memory, viz., 1 Ric. I, and those made since. The former are considered as part of the common law, the *leges non scriptæ*: and, notwithstanding that copies of them may be found, their provisions obtain at this day, not as Acts of Parliament, but by immemorial custom and usage."

It will be observed that Lord *Cottenham*, in *The Queen v. Millis*, and C.J. *Pennefather* in the same case regard the constitutions of Edmund and Lanfranc, not as a matter of immemorial custom and usage, but as positive rules, by which the Ecclesiastical Courts were regulated. If there is any correctness in the saying that "the statute law is the will of the Legislature in writing," these constitutions come most strictly within the definition. They came into existence by promulgation; their origins are ascertained; the records of them are extant. Now,

though it might have been convenient in former times for the Judges, *manu forti*, to hold that legal memory in some cases commenced with the first year of the reign of Richard I, and though, for certain subjects of discussion, written laws before a certain period may be classed and arranged with the *leges non scriptæ*, and be deemed and taken to be part of the customary law of England, to distinguish them from that particular series of enactments in the ordinary Statute Book, such arbitrary (however convenient) classification cannot alter the nature of the older constitutions. Granting that in a sense the Saxon laws, whose records are perfect, are no portion of what are called "*the statutes*"; allowing, moreover, that certain positions of law which we meet with must be classed with the customary law of England (though we know they must have originated by enactment), I cannot but consider it an abuse of terms to say, that it is a *lex non scripta*; and I think it a confusion of ideas to deem a piece of positive institution to be a portion of the common law, because from the loss of its record it must be classed with the customary law of England.

Lord *Hale*, moreover, is not quite consistent with himself, as he says in his history, "Those laws that I call *leges scriptæ* are such as are originally reduced into writing before they are enacted." Again *Blackstone* says, "I style these parts of our law *leges non scriptæ*, because their original institution and authority are not set down in writing, as Acts of Parliament are but they receive their binding power and the force of laws by long and immemorial usage, and by their general reception throughout the kingdom."

Admitting however (in the sense he has used the observation) the correctness of Lord *Hale's* assertion, that some of the written laws of England must be deemed unwritten laws by reason of their antiquity, I nevertheless venture humbly to maintain, that such laws are no portion of the pure common law of England. The whole body of English, like that of every other law, is divisible into three parts—1st, the law of nature. 2nd, customs peculiar to the country. 3rd, statutes promulgated by legislative authority—*Omnia jura humana aut sunt lex naturæ, consuetudines, vel statuta, quæ et constitutiones appellantur*. The common law of England I take to be the law of nature. The customary law of England I consider to be the aggregate of those positions of law, which, from their character, we see must have originated by enactment, but of which the recorded memorials are lost. The threefold division of English law I have before-mentioned is, therefore, equivalent to the more scientific twofold division expressed by Dr. *Taylor*, in his

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1850. *Elements of Roman Law.* "All law is either natural or instituted. REGINA Natural law is the rule and dictate of right reason, showing the moral deformity to its suitableness to a reasonable nature. The power or v. authority which gives this law a sanction is the voice of God, through ROBERTS. Dickinson J. natural reason. Positive, voluntary, instituted law, is that which does not flow from the general condition of human nature, but has for its objects things merely indifferent, and is founded on the sole pleasure of the lawgiver, who is some person or persons authorised for that purpose : so that the division of law is into natural and instituted." Hence it appears to me, that the customary and statute law of England comprise a body of instituted law peculiar to that country, and that the common law of England is the law of nature, which is universal to all mankind. To show that the common law of England is identical with that of nature, and also that English law is either natural or instituted, I will now endeavour shortly to explain the process, by which the legal result from a given state of facts is ascertained in the ordinary administration of justice.

A dispute arises. The litigants submit the facts to the determination of a Court. In the natural course of procedure, the Judges enquire whether there is any positive enactment that can embrace, or known position of law which must govern, the facts submitted to them. If such rule or statute can be discovered, the dispute is decided by it, and the decision becomes an exposition of positive law, and passes into a precedent. But if no such statute or rule of positive law can be found, the next investigation is whether such a state of facts has before received a judicial decision. If such decision can be discovered, it is in general immediately applied, unless it is manifestly repugnant to reason. But if no combination of facts identical with that before the Court can be discovered, a similarity may nevertheless be observed between the relations of the facts disputed, and of others that have received the determination of a Court. In such an event, the Judges resort to the argument by analogy, and apply to the case before them the same decision as was awarded upon the former combination. If, however, no rule or statute can be produced, and no decision upon identical or analogous circumstances can be discovered, the Judges are obliged to resort to the dictates of their natural reason, and to those external maxims of right and wrong which constitute the first truths of legal science ; and their conclusions are founded on a full consideration of what is reasonable and just for the disputants to perform. Upon occasions in which facts thus receive a first determination, the law is said to be *declared* ; and is deemed not to be *then created*, but to have existed for ever in the

abstract, until it was *discovered* in the disputed facts ; and a proposition of law thus concentered assumes its place in the body of rational jurisprudence, and stands as a precedent for future occasions. The validity of these decisions is asserted by the Judges, as being logical deductions from some acknowledged premises of natural justice ; and such decisions, and others grounded on them, are the principal evidence of what is the common law.

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With regard to Mr. *Bentham's* observation, that the law so declared is *made* by the Judges, and in all instances *ex post facto*, it is certainly correct that it is only discovered and asserted by the Judges, after facts are submitted to their decision. But that is no valid reproach to it, for the Judges decide, according to their conception of the reason of each case submitted to them, and their decisions obtain the vigour of law by general acquiescence in their reasonableness. For when decisions are unreasonable, they are generally attacked with such severity of criticism that the Judges are induced to recede from the positions they have laid down. Thus the well-known decisions by Lord *Mansfield* of certain cases, which arose before him in the King's Bench, upon principles which were peculiar to the equitable jurisdiction of the Court of Chancery, were canvassed with such acrimony and justice by *Junius*, by *Fearne*, and others, that the Courts subsequently declined to act upon them ; and thus those decisions were wrenched from the law, into whose body they were intruded. More recent decisions of the King's Bench, that the surrender of a term might in certain cases be presumed, were commented upon by Sir *Edward Sugden*, and others with such severity and reason, that the same Court receded from the law they had laid down, by their judgment in the case of *Doe v. Plowman* (42).

That the decisions of the Judges obtain the force of law, not by their intrinsic reasonableness alone, but also from general acquiescence, is manifest, from the circumstance that some decisions, which are demonstrably unsound, are yet adhered to by the Courts because they have been acted on so long, that the public have been accustomed to regulate their transactions on their authority. Thus it is observed in the note to *Hodsdon v. Harridge* (43) "that though the decision of *Whitcomb v. Whiting* was considered by the King's Bench to be hard, and ought not to be extended, it is nevertheless now settled law, as it has been upheld in numerous instances." In *Crease v. Sawle* (44), the Court of Exchequer Chamber appears to have rather submitted to a series of four cases,

(42) 2 B. & Ad. 573. (43) 2 Vn. Wms. Saund. 64, f. (44) 2 Q. B. 862.

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extending over half a century, than to have acquiesced in the propriety of those decisions. Whether therefore in all cases decisions are reasonable or not, it seems clear that they are pronounced by the Judges and received by the community, on conviction that they are reasonable, and the probability of course is that they are eminently correct.

On the whole, therefore, it would seem, that the majority of the last-mentioned decisions of the Judges have become law, because their conclusions, have, by those on whose legal learning the public relies, been perceived to be equivalent to certain other propositions—immediately appreciable by the natural reason of mankind. By such last-mentioned decisions all men may know the law which is propounded by them, for “we are said to know the law when we apprehend the reason of the law; that is, when we bring the reason of the law so to our own reason that we perfectly understand it as our own.”

Such being the mode of discovering and asserting the law, which must (in the absence of specific provisions or known usages) guide disputed facts, it is obvious that the law so discovered must have existed even from eternity; for the relations (to adopt the seeming paradox of *Montesquieu*) must have arisen before the objects related. “Particular intelligent beings,” says *Montesquieu*, “may have laws of their own making, but they have some likewise which they never made. Before there were intelligent beings, they were possible; they had therefore possible relations, and consequently possible laws. Before laws were made, there were relations of possible justice.” This portion of the law of England is therefore the law of nature, and is consequently common to all mankind. “*Singulorum autem hominum multis modis res fiunt; quarundam enim rerum dominium nanciscimur jure naturali, quod, sicut diximus, appellatur jus gentium.*” This portion of the law of England must therefore now be and always must have been that of all mankind—the same in ancient Rome and Athens, in modern London and in Sydney. *Nec erit alia lex Romae, alia Athenis, alia nunc, alia posthac; sed et omnes gentes et omni tempore una lex et sempiterna et immutabilis continebit; unusquis erit communis quasi magister et imperator omnium deus.* It is the reason of mankind, and “its voice is the harmony of the world.” From its universality it is the birthright of every man, and therefore of every Englishman wherever he may be; and more particularly so when he is in Britain or its dependencies. This law of nature, whether it is the whole or only a portion of the common law of England, must necessarily be applicable to this colony of New South Wales.

Before quitting this part of the subject, I may remark, that some positions of the canon and civil law are reckoned as parcel of the common law of England. Such positions are so incorporated, not from any peculiar force of their own, but from their consistency with that natural reason, which is, as I conceive, the essence of the common law. Various usages, moreover, according to Lord *Hale*, are to be reckoned as a portion of the common law, though we know they must have originated by statutes, because the memorials of their commencement have been lost. But if, when a statute is made in one century and lost in the next, so much of it as is remembered shall be therefore classed with the common law, it by no means follows that when the memorial (as those of the ordinances of Edmund and Lanfranc have been) is recovered, its provisions shall be esteemed as a portion of the common law. Though usages may be classed with the *lex non scripta*, for more conveniently distinguishing them from extant statutes, they clearly appear to my mind to partake more of the nature of the statute than the common law, as being matters obviously not of the natural law, which is common to all nations, but of the instituted law, which is peculiar to England.

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From the method of discovering the common law, it is evident that its *spirit* is essentially the consideration of the public advantage ; for in the resolution of cases of the first impression, the Courts must proceed as in matters of pure ethics, and decide according to their views of general consequences. On the other hand, no community is ever likely to sanction a decision that is perceived to be more advantageous to individuals than the majority. It is a leading maxim of the common law, that "a private mischief is preferable to a public inconvenience."

Having, as I conceive, now established, that the law of England is either natural or instituted, and that the former is the common law of all mankind, and is therefore applicable to all communities ; the first question for consideration is, whether the English law of marriage, which arose out of the ecclesiastical constitutions mentioned by Lord *Cottenham*, is parcel of the natural or of the instituted law.

I am of opinion, that by the law of nature a contract *per verba de presenti* was in England, before any statutes were enacted, effectual as a marriage. For positive laws are the creatures of society, of which marriage is the foundation. "The Lord God said, it is not good that the man should be alone ; I will make him a helpmeet for him." "And the rib which the Lord God had taken from the man, made he a woman, and brought her unto the man." Marriages, therefore, existed before instituted law ; and the manner of their celebration, and the duties arising out of the

1850. relation, must in the beginning have been a matter of natural law.
 REGINA Before the existence of prescribed regulations of marriage, the relation
 v. must have been constituted solely by the agreement of the parties ; and
 ROBERTS. although, from the passage I have cited, and from many others in the
 Dickinson J. Holy Scriptures it may be inferred that a religious solemnity is decorous
 for a marriage, yet in no part of the Bible, that I can remember (or
 have after inquiry been able to ascertain) is such a ceremony laid down
 as essential to the matrimonial state. I have read with great attention
 the article MATRIMONIUM, in *Smith's Dictionary of Greek and
 Roman Antiquities*, from which it appears that, though in Greece sacri-
 fices were offered before, and a marriage feast was held after it, the mar-
 riage was nevertheless effected without either publicity or the intervention
 of a priest. From the same article it clearly appears, that though, with a
 view to the acquisition by their children of certain offices, persons were
 in Rome sometimes married by a religious ceremony, yet that there were
 two other kinds of valid matrimony, in which such solemnity was not
 observed. It is, I believe, an acknowledged fact, that before the Council
 of Trent, marriages were always on the Continent of Europe considered
 to be valid without any religious celebration. The usage, therefore, of
 the Jewish, Greek, and Roman nations in ancient times, and the custom
 of modern continental Europe, to contract marriages without the inter-
 vention of a priest are evidence that no religious ceremony is necessary,
 by that portion of the law of England, which is the reasonable and
 inferential law of all mankind. After the decision in the *Queen v.
 Millis*, I will not venture to say that the case of *Dalrymple v. Dalrymple*
 is conclusive, that the common law of England did not require the inter-
 vention of a priest to make a marriage valid for all purposes ; but I
 think I have clearly shown, at all events, that the *Queen v. Millis* is a
 decision not upon the law of nature, but merely upon the law anterior
 to the Marriage Act of George II, which was obviously founded upon
 the positive ordinances which are the foundation of Lord *Cottenham's*
 judgment.

The law of marriage in England, anterior to the Marriage Act of
 Geo. II, being (whether regarded as part of the statute or customary
 law) a portion of the instituted law of England, we must consider
 whether it is applicable to the circumstances and condition of this
 colony.

That question involves a discussion of the principles, by which we
 must in all cases adjudicate upon the applicability to this colony of the
 positive law of England.

I believe it has been considered by some, that a statute is inapplicable to a colony which has not the machinery to carry out its provisions ; and the inapplicability of the English Bankrupt Acts has been placed upon that ground. But, though the want of means to carry out its provisions may in some instances be regarded as decisive against the application of a statute, no general rule upon such a reason can be laid down ; inasmuch as this Court has applied the Statute of Uses (27 Henry VIII, c. 10) to this colony, though the places for enrolment are, by the statute 27 Henry VIII, c. 16, fixed to be in England. It appears to me, that it would have been monstrous, when the feudal (as *inextricably interwoven* with the common) law became the law of real property in this colony, that so valuable a portion of the system of conveyancing as the Statute of Uses should have been held inapplicable, because there was not here the officers for enrolment, which was appointed by the last-mentioned statute. It was a manifest advantage in the infancy of the colony, that its inhabitants should have their landed property regulated by the settled law of real property as developed in England ; and this Court may have anticipated, that such publicity as was afforded against secret conveyances by the statute, 27 Henry VIII, c. 16, would be thereafter provided, as has been since done by the colonial authorities. Some other reason must be therefore sought, for the solution of the question we are considering, than the mere deficiency of machinery ; and it occurs to me that the applicability to this colony, or any portion of the instituted law of England, must depend on the similarity of its spirit to that of the natural law, which is the birthright of every British colonist, as being common to all mankind in all places. Now, as the spirit of natural law is universal applicability, and as we have seen it is discovered and declared by the proper exercise of human reasoning upon general consequences, I think that no statute or other portion of the positive law of England should be adjudged applicable to this colony, unless this Court should think its provisions of more extensive than merely local benefit, and such as the colonial legislature would by its own ordinance declare applicable to this dependency. For, as by the statute 9 Geo. IV, c. 83, s. 24, this Court, as often as a doubt arises before it as to the applicability of an English law or statute, whereon the local legislature has made no declaration, is invested with a kind of legislative power, the principle that should be pursued by this Court in so virtually making a local law (whereby something is added to or taken from the natural law) is, that we should take care that, though the innovation may not observe the law of nature in all things, still that the former should not altogether violate the latter ; that it should be a law,

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which though not applicable to all places as the law of nature is, should be so far like it as to be expedient for most people in the colony. *Jus uno modo dicitur, quod omnibus aut pluribus in quaque civitate utile est, ut est jus civile.* Hence, statutes which appear to be as useful to the colonists of New South Wales, as to the inhabitants of England, such as the Statutes of Frauds, Uses, Limitations, and others, have always been regarded as applicable to this territory. On the other hand, statutes like the Apothecaries Act and others, which appear to have arisen from peculiar circumstances in England, and which evince no palpable advantage to this community, have in this Court been adjudged to be inapplicable.

Admitting, as every Christian is likely to allow, and every decent woman will certainly insist, that in all communities it is desirable that regulations should be made for the prevention of clandestine marriages, and believing that the generality of mankind will always desire to perform that contract with the solemnities of religion, the question is, whether the natural law should be restrained, and those most desirable objects be effected in this colony according as they originally were in England by the ordinances of Edmund and Lanfranc. I am clearly of opinion that the Court ought not to adjudicate that the marriage law of England, which was founded on those ordinances, is applicable to the circumstances of this colony. For, on consideration of the statute of 9 Geo. IV., c. 83, sec. 24, I think this Court can only declare such portions of English law applicable to this colony, as the Colonial Legislature would declare to be applicable by *ordinances to be by them for that purpose made.* I am satisfied that the Legislature of this colony (representing a community comprising Roman Catholics, Hebrews, and persons professing the opinions of the Church of England, and other Protestant religionists), would not and ought not at this advanced age of the British Empire, in a colony where there is no Church established as in England, to declare applicable to its circumstances and condition a marriage law, which originated in the circumstances of England 900 years ago, when the whole population professed the Roman Catholic religion; a law which was found so inapplicable to the condition of England after the Reformation, that a marriage by a deacon of the Church of England came to be considered as effectual, as one celebrated by a priest of the Church of Rome; a law which was so offensive to the feelings and consciences of Protestant Dissenters, and caused such heart-burnings and excitement in England, that the British Legislature virtually declared it inapplicable to the condition of Great Britain and Ireland in these times, by enacting the recent statutes for the registration of births, deaths,

and marriages ; a law which the legislature of this colony, by enacting the local law 5 Wm. IV, No. 2 (the draftsman of which evidently imagined that the English Marriage Laws were in force here), has shown to be inapplicable to New South Wales ; a law which would compel every Methodist, Quaker, and Jew, to be married (unless his case could be brought within the 5 Wm. IV, No. 2) by a clergyman of either the Church of Rome or England. Such a law is, I think, too inconsistent with the religious equality existing in this colony, to be by us adjudged applicable to its condition.

Being of opinion, then, that the decision in the *Queen v. Millis* rests upon positive law, which is not applicable to this colony, and as it has by this Court been decided that the Marriage Acts of Geo. II and Geo. IV are also inapplicable to the colony, and as no ordinance has been made by the Colonial Legislature, for the purpose of declaring the applicability to this colony of the English Marriage Laws, the only question of statute law which remains, is one arising out of the Colonial Act, 7 Wm. IV, No. 6, entitled "An Act to prevent Clandestine Marriages, and to provide for the issuing of Licenses." The question is this: Has the 3rd section of that Act (not by declaration or adoption of any English law, but) by its own new enactments, invalidated as marriages, matrimonial contracts *per verba de presenti*? For by that section it is enacted, "that in no case whatsoever shall any suit or proceeding be had in any Ecclesiastical Court, in order to compel a celebration of any marriage *in facie ecclesiæ*, by reason of any contract of matrimony whatsoever, whether *per verba de presenti* or *per verba de futuro*, any law or usage to the contrary notwithstanding." This section follows the 13th section of the English Marriage Act, and the 3rd section of the statute 58 Geo. III, c. 81. The last-mentioned enactments appear to me (having reference especially to the remarks thereon by the Lord Chancellor, and by Lord Cottenham, at pages 871 and 890 of *R. v. Millis* not to have *newly enacted* (for in such event there could have been no difficulty whatever in the case of the *Queen v. Millis*) that matrimonial contracts, by words *de presenti* or *de futuro*, should thereafter be invalid as marriages, but that the Spiritual Courts in England and Ireland should not interfere with them. For, in England and Ireland, the Spiritual Courts appear to have usurped the power of declaring matrimonial contracts to be very marriages, notwithstanding the positive Saxon laws to the contrary, of more ancient date than the canon law, under which the Spiritual Courts acted. The effect of the Imperial enactments mentioned was not to make new laws, but to revive and enforce the law of the land as established by the Saxon ordinances. The last mentioned statutes

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1830. appear to me not to have *newly enacted*, that the matrimonial contracts therein mentioned should thereafter be invalid, but to have prevented the Courts Spiritual from giving them a validity by force of the canon law, in opposition to the more ancient law of the realm as established by the Saxon ordinances ; which had altered the law of nature by requiring marriages to be solemnized by the intervention of a mass priest.

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The history of this portion of the law seems to me to be as follows :— By the law of nature (as has been shown) contracts of matrimony *per verba de praesenti* were originally in England actual marriages. That law was altered by certain Saxon ordinances, requiring in marriage the intervention of a priest. Then the Courts Spiritual, notwithstanding this alteration, in effect revived the natural law, by avoiding a second legal marriage, and enjoining the public celebration of a former contract, when such existed ; which interference the statutes 26 Geo. II and 58 Geo. III prohibited, and so re-established the alteration of the law of nature. As, therefore, the wording of the Colonial is identical with that of the Imperial enactments, it follows that if there had been in this colony a Court Spiritual, acting in this matter as those in England and Ireland, the only operation of the colonial enactment would have been to revive whatever was the law in this territory before the institution of that Court. And the effect cannot be greater, because there is no Ecclesiastical Court in which it can operate directly.

Hence I am of opinion that the marriage of the prisoner by Dr. *McGarvie* (though it has obtained neither validity nor invalidity by force of the colonial Act 5 Will IV, No. 2, is nevertheless as good as the marriage solemnized by Mr. *Brigstocke*. For the efficacy of marriages in this colony depends, not upon any portion of the instituted, but on the natural law of England. According to that last mentioned law, *marriage is constituted by consent*. Notwithstanding the several colonial enactments before mentioned, I conclude that the first marriage of the prisoner in the presence of Mr. *Brigstocke*, and also the second (out for the continuance of the former) ceremony before Dr. *McGarvie*, were valid marriages by the laws of nature, as being *nuptia per verba de praesenti* ; and (though sanctity and decency were imparted to them) that neither of those marriages acquired any greater legal efficacy from the intervention of those reverend gentlemen respectively. I am therefore clearly of opinion that the prisoner was properly convicted of bigamy, and that he should receive the sentence of the law for that offence.

TERRY, J. I fully admit and feel the importance of the question now submitted to our decision, and it is from a sense of its importance that I am anxious to abstain from introducing any extraneous topic into the discussion of it that might augment the difficulty, without materially aiding us, in coming to a satisfactory adjudication. According to the view presented to my mind by the special case submitted to us, the question on which we have to pronounce judgment is not whether the law laid down in *The Queen v. Millis* (46), and in support of which much reliance was placed on the Institutes of Edmund and the Ordinances of a council held at Winchester in 1076, in the times of Archbishop Lanfranc, should be regarded as statute or as common law; nor whether, to whichever class of our laws this particular law may properly belong, it be a portion of the statute or common law of such universality as that it can and ought to be applied to the present state and condition of this colony; but simply, whether on the facts disclosed in the special case the second contract entered into by the prisoner was sufficiently a marriage to support an indictment against him for bigamy?

When I consider the momentous interests involved in the decision of the first two questions to which I have adverted—when, too, I consider the grievous mischief that may be inflicted on this community by an error in judgment in dealing with them, and, moreover, as I find when this vast subject—the marriage law of England—was surveyed in all its proportions and details by six men of consummate learning, four of whom had filled the office of Lord Chancellor, and two the office of Lord Chief Justice of our principal Courts of Common Law, that they were divided in opinion, three against three, as to what really was the law, and that the judgment arrived at was only come to by the force of a technical rule of the House of Lords, that when on a division the numbers are equal “*praesumitur pro negante*,” I hesitate not to avow that seeing there were such fluctuation and opposition of opinion in so high a quarter, I feel that it becomes me to be wary and diffident in pronouncing an opinion on topics in which interests of such great magnitude are involved, and for pronouncing which I could offer no excuse, except one from which the nature of the present case exempts me, namely, the being constrained to do so from a stern and imperative obligation of duty. From such an obligation I am relieved in the present instance, because, irrespective of these important questions, which are rather incidentally suggested than directly raised by the special case before us, there is, in my opinion, the authority of decided cases, under circumstances similar to the present, to guide and govern our decision.

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From the prominent place assigned to it, in the arguments of counsel on both sides, I deem it right to advert briefly to the case of the *Queen v. Millis*, with the view of pointing out one or two leading features, in which it bears no resemblance to the present. The facts of the case are shortly these: *George Millis*, a member of the Established Church in Ireland, went, accompanied by one *Hester Graham*, a Presbyterian, to the house of a regularly placed minister of the Presbyterian Church, of the parish where the minister resided, and there entered into a present contract of marriage with the said *Hester*, the minister performing a religious ceremony between them, according to the rites of the Presbyterian Church. *George Millis* and *Hester Graham* lived together for some time as man and wife; *Millis* afterwards (*Hester* being still alive) married another person in a parish church in England. The House of Lords decided that the first contract thus entered into was not sufficiently a marriage to support an indictment against *Millis* for bigamy.

In the first place, it is important to bear in mind that the question *there* under adjudication was the validity of the first marriage, of which all the authorities unite in declaring there must be strict proof; *here* the second marriage which (living the first wife) it is contended constitutes the crime of bigamy, is the one under consideration; and, *secondly*; although by the law of Ireland a Protestant dissenting minister might, by the statute law, celebratè marriage between two members of his own religious community, he was not authorised to do so where one of the parties was a member of the Established Church. *Here*, however, the second marriage is one which the statute law of this country authorises by a Presbyterian minister whenever one only of the parties is a member of his church. A marriage, then in Ireland under such circumstances, it was decided, could at most amount only to a marriage *per verba de presenti*, a species of contract to which the same incidents of validity did not attach as to a marriage solemnized by a person in Holy Orders, inasmuch as it did not confer on the woman the right to dower, or on the man the right to the woman's property, or on the issue the right of legitimacy, and did not render the marriage either of the parties (living the other) *ipso facto* void at law, and therefore was not such a valid first marriage as would furnish a foundation for the criminal charge of bigamy in the event of a second marriage. That a marriage *per verba de presenti* was formerly good for many purposes, it was not denied, such as for the purpose of rendering the marriage indissoluble, not to be released by the mutual consent of the parties, of enabling either of them to enforce and compel solemnization, and even of rendering a

subsequent marriage solemnized *in facie ecclesie*, even after cohabitation and the birth of children voidable, and was therefore styled in the ecclesiastical law, *verum matrimonium*: yet many of these purposes have since been defeated by the 13th section of the English Marriage Act, extended to this colony and adopted by the 7th Will. IV., No. 6, section 3, by which it is enacted, "That in no case whatsoever shall any suit or proceeding be had in any Ecclesiastical Court in order to compel a celebration of any marriage *in facie ecclesie*, by reason of any contract of matrimony whatever, whether *per verba de presenti*, or *per verba de futuro*, which shall be entered into after the end and expiration of ten days next after the passing of this Act." The effect of this statute has been as the Lord Chancellor (*Lyndhurst*) remarked, to change entirely the character of a contract *per verba de presenti*, at least as to its temporal purposes. It is no longer indissoluble, solemnization cannot be enforced; it has no longer the effect of avoiding a subsequent marriage solemnization *in facie ecclesie*, but such is from the time of its celebration valid and binding, and accompanied with all the civil consequences of a regular and perfect marriage. The passing of this Act, twelve years ago in this colony, shows that we were not even then considered to be in a very primitive condition as to the law of marriage, or without, it may be presumed, ample means for its celebration by religious ministers; and, moreover, when we find such a law enacted so far back in point of time, we may well be excused from entering into an unprofitable speculation, or pronouncing theoretical opinions on what marriage law was applicable and in force in this colony at its first formation, and before clergymen arrived here, if, indeed, at any time—a fact that was not alleged—since the first formation of this colony, there were not clergymen resident therein.

Without enlarging upon the question whether or not a Presbyterian Minister is a person who may be by the common law regarded as a person in "Holy Orders," it is sufficient for my purpose that he is a recognised minister under Acts, both of Imperial and Colonial Legislation, for the purpose of the solemnization of marriage. Not only is he so regarded under the 5th Will. IV, No. 2; But in the 3rd Vic., No. 7, which imparts, under the conditions prescribed by that Act, the same validity to marriages solemnized by Wesleyan Methodist Ministers, as "if such marriages were solemnized by Clergymen of the Church of England, Presbyterian Ministers, or Roman Catholic Priests, according to their respective churches." So much for colonial recognition, and as to recognition by the Imperial Legislature, the Act for legalising marriages in India, by Presbyterian ministers in India, is an Imperial

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1850. Act, and our colonial Act is almost literally copied from it. In these Acts Presbyterian clergymen are dominated "ordained ministers of the Church of Scotland."

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Therry J. To impart a complete and perfect validity to the marriages they solemnise, certain statutory conditions are prescribed. The binding validity of the marriage under all circumstances and for all purposes, is not the question however for adjudication in this case, but whether the ceremonial in the present instance did not make such a marriage *de facto* within the true meaning of the statute of bigamy as will sustain the indictment. If this question be decided in favour of the Crown, there must be judgment against the prisoner, and I shall proceed therefore to state the reasons which have led me to the conclusion that on the occasion of the second marriage here, there was such a contract and such a solemnization before a Presbyterian minister, as constitutes the crime of bigamy. And, first, in reference to one point, on which I observed that the present case is distinguishable from *the Queen v. Millis*, namely, that in the latter case it was stated in the special case before the Court, that one of the contracting parties to the marriage was a member of the Established Church in Ireland. By reason of this fact the Presbyterian minister is *functus officio*. Lord Chief Justice Tindal, in his judgment, refers to the statute empowering dissenting ministers to solemnize marriages in Ireland, and gives it as one of the grounds for regarding the presence of a Presbyterian minister at the first marriage of *Millis*, as if it were only the presence of a layman. "Unless," said he, "some Act of the Legislature has interposed its authority and given the Protestant dissenting ministers in Ireland the same power for this purpose as the persons in holy orders did before possess, we think the entering into the contract in his presence, cannot, in the legal sense of the word, be held to be entering into it in the presence of a person in Holy Orders. Now no statute has been brought forward except the 21st and 22nd Geo. 3rd, chap. 25 (Irish), but the operation of that statute is limited to matrimonial contracts or marriages between Protestant dissenters and solemnised by Protestant dissenting ministers or teachers; and, as your Lordship's question goes on to state that one of the contracting parties in this case is not a Protestant dissenter but a member of the Established Church of England and Ireland, it follows that the case does not fall within the statute, and that it must be decided as if that statute had never been passed."

But our colonial statute, the 5th of Will. IV., No. 2, is not of so restrictive a character as the Irish statute, for it empowers Presbyterian

ministers to solemnize marriages not merely between members of their own communion, but wherever "one of the persons is a member of, or holds communion with the Church of Scotland." And the special case before us, so far from stating that neither of the parties were of the same communion with the officiating minister, sets forth that the prisoner, before his second marriage, "told Mr. *M'Garvie* that *Elizabeth Goodwin* was a Presbyterian." Now, although I do not think this oral declaration is a sufficient substitute for the written one to satisfy the requirements of the statute, yet, it is a statement by which he is bound.

His own declaration estops him from saying to Mr. *M'Garvie* "you are not a person in Holy Orders, competent to solemnize this marriage," after seeking to have the ceremony of marriage solemnized according to the rites of his particular church, after furnishing testimony from his own lips, which brought him within the jurisdiction for the purpose of marriage, by a minister of that church, and after, moreover, being a party to its celebration and recognising by his whole conduct that the minister who officiated at the ceremony was competent, and fully qualified to do so. On whatever other ground then it may be impeachable, at least, he who sought out the minister, and recognised his jurisdiction, cannot be permitted to regard him otherwise than as a person whose office for the purpose of giving validity to the solemnization of a marriage is to be considered as equivalent to that of a priest in Holy Orders. That a man is bound by the restriction and obligation of that form to which he submits, and bound to the consequences if he departs from and transgresses them, is forcibly illustrated by the case of *Jones v. Robinson* (47), where one of the parties to the marriage was a Jewess, but had been married in the Christian Church. Sir William Scott said, "the marriage was celebrated according to the Christian form. Whatever her persuasion was, she conformed in this respect to the Christian religion, and is liable to the consequences, if she departs from it."

In the case of *Reg. v. Orgill* (48) which was an indictment for bigamy, where the second marriage was performed by a Roman Catholic priest, to whom the prisoner represented or held himself out as one of that religion, Baron Alderson expressed his decided opinion that the prisoner could not at the trial set up as a defence that he was a Protestant. The circumstances of that case were these: In Ireland, the marriage of two Roman Catholics by a Roman Catholic is good, and if a person at the time of such marriage declares himself to be a Roman Catholic, and the woman to be a Catholic, this is a good marriage as against him, and if

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(47) 2 Phillimore 235.

(48) 9 C. & P. 80.

1850. he be afterwards tried for bigamy on this marriage (he having been married to another wife who was still alive) he will not be allowed to set up his supposed Protestantism as a defence to the charge. No ground, 'tis true, is suggested in the present instance for supposing the statement to be untrue, but assuming even that it were so, the principle decided in *The Queen v. Orgill* is, that when a party imposes upon a clergyman and represents one of the parties to the marriage to be a member of his own religious denomination, and thus by fraud procures the clergyman to marry him, he shall not afterwards be allowed to say that he or she were of a different denomination from that of which at the time he described her or himself to be a member. Applying the principle of this decision to the present case, it establishes this, that the prisoner should not be allowed to assert *Eliza Goodwin* to be a Presbyterian, in order to procure a marriage, and afterwards deny that she was a Presbyterian, in order to escape the consequences of his crime. The case of *Rex v. Edwards* (49), is another important case, showing that a party is legally as well as morally estopped from contradicting his own statement or from availing himself of a false one, for the purpose of escaping the punishment due to his offence. There, on a case reserved, all the judges held that the prisoner having signed the note for the publication of banns between himself and *Anna Tinson*, whose real name was *Susannah*, and having signed the register of his marriage with her, by that name wherein she went, he should not be permitted to defend himself, on the ground that he did not marry *Anna Tinson*, although such might not be her name; and that, therefore, the conviction was right. So here, the prisoner having represented *Eliza Goodwin* to be a Presbyterian, he should be obliged to stand by his own statement, and abide its consequences. Besides, *Rex v. Edwards*, and *The Queen v. Baum* (50) (in its circumstances more resembling the present), in which, though the second marriage was void by statute, yet as the ceremonial was good, proof of such ceremonial, and of a first marriage of unexceptionable validity, was held sufficient to constitute the crime of bigamy. "I am of opinion," said Lord *Denman*, in the latter case, "that the validity of the second marriage does not affect the question. It is the appearing to contract a second marriage, and the going through the ceremony, otherwise it could never exist in the ordinary way, as a previous marriage always renders null and void a marriage that is celebrated afterwards by either of the parties during the lifetime of the others. Whether, therefore, the marriage of the two persons was or was not in itself prohibited, and, therefore, null and void, does not

(49) *Russ. & Ry.* 285.

(50) 1 C. & K. 144; 1 Cox C.C. 33.

signify, for the woman having a husband then alive, has committed the crime of bigamy by doing all that in her lay, by entering into marriage with another man."

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That it is unnecessary to establish the validity of the second marriage to constitute bigamy, is also shown by the case of *The Queen v. Penson*, where, on an indictment of a man for bigamy, it appeared that for the purpose of concealment, the second wife was married by a name by which she had never been known; it was held that this was no answer to the charge, although if the first marriage had taken place under such circumstances that would have been thereby rendered void. These and many other cases show that second marriage by the mere force and reason of its invalidity from other causes, when the first marriage is valid, will not exempt the criminal from the punishment due to the offence of bigamy, though the converse of the proposition cannot be maintained, for if the first marriage be invalid and the second valid it is not bigamy. The case of *The Queen v. Millis* (51) indeed supports this position, and it is further illustrated by the following case (52):—A married B in Holland, and afterwards in the same country married C in B.'s lifetime; B died, and then (living C) A married D in England. This was holden not to be within the Act, because the marriage with C was simply void. But if B had been living, it would have been felony to have married D in England. Indeed Lord Hale says, that the second wife is not so much as "his wife *de facto*" (53), which is the reason why the second wife may be admitted to prove the second marriage. This accords with the definition of bigamy given by *Poynter*, a Proctor of Doctors' Commons, of much experience, who, in his treatise on marriage and divorce, defines bigamy to be "where there is a prior marriage, he or she having a wife or husband living at the time of the second (pretended) nuptials." The same distinction in the definition of a first and second marriage, for the purpose of bigamy, is preserved, in the language of Lord Denman, in the case of *The Queen v. Millis* (51). "If," said his Lordship, "the second marriage be good for any purpose, it is good for the purpose of rendering him who commits the vicious and cruel act of deserting one wife, and deceiving another woman *by the pretence of a marriage*, a criminal in the eye of the law. The offender takes his chance, whether his first contract will be held a marriage, and his second a crime, and not more ignorant of the consequences than many offenders he must abide by them." "It is but just," to use the language of Baron Gurney, in *Penson's case* (54), "that the punishment

(51) 10 Cl. & Fin. 534.

(52) 1 East P.C. 466.

(53) 1 Hale, 693.

(54) 5 C. & P. 412.

1850. due to the offence should not be averted by 'a *preconcertedly invalid marriage.*'" The reason and justice of this decision surely cannot be questioned, for the second marriage is not so much a marrying as an usurpation of the rights of marriage, involving the abandonment of one whom by the law a man is bound to cherish and protect, and the prevailing upon, in most instances, an unsuspecting female, to surrender her person in exchange for an empty title which gives her no rights and which the law can in no degree acknowledge.

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On the whole, then, although by reason of the omission of the declaration, which is no part of the ceremony, but which the statute directs should be made previous to solemnization, the marriage, if it were a first marriage, might be regarded as invalid, yet as by the prisoner's own statement to Mr. *M'Garvie*, which he is now debarred from gaining, the parties were persons between whom he, as a Presbyterian minister, might solemnize marriage, and, moreover, as in consenting to submit to this form the prisoner thereby recognised and acknowledged the obligations of marriage, and so far the qualification of both the contracting parties and the celebrant for the purpose of the ceremony, is established; the present case is brought within the principle of that class of cases to which those I have cited belong viz.: *Queen v. Baum*; *the Queen v. Penson*; *the Queen v. Orgill*; *Jones v. Robinson* (2 Phill.); and *the Queen v. Edwards*; and on the authority of these cases I arrive at the conclusion that the prisoner was duly convicted of bigamy. Deeming it expedient for the reasons I have stated to restrict my view and opinion to this, the main material question before us, I cannot conclude without the expression of an earnest hope, that the marriage law of this colony may soon engage the attention of those on whom the duty of legislation devolves, and that the case of *the Queen v. Millis* may not again be presented to our consideration, with all the questions of difficulty and embarrassment with which the conflicting opinions of the eminent and learned men by whom that judgment was pronounced have surrounded it. Already in India embarrassment seems to have been created by the decision in *the Queen v. Millis*. In the last *Colonial Magazine* there is mention made of a case that has occurred in one of the Indian settlements, and although this work is not entitled to the weight due to an authorised report, yet from the way in which the case is introduced and stated it seems to possess that accuracy of statement which entitles it to be regarded as an historic account of an important event of the day. Regarding it even as an instance devoid of authenticity, it illustrates the inconvenient consequences that might arise from

an absolute decision that the law of marriage as laid down in the case of *the Queen v. Millis* is applicable to the condition of this colony and should be enforced therein.

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The case is entitled *M'Lean v. Cristall*, and the circumstances are these:—An officer, Major *M'Lean*, in the Company's army, had as he thought, contracted marriage with the daughter of another European, who was moving in the best society at the same station. His supposed wife was always considered to be his real wife, and become the mother of a family, who according to Indian custom, were sent to England for education. The officer was engaged in the late wars, and his wife, not being allowed to follow her husband's regiment, was left at a small station with other ladies, where she unfortunately forgot her duty to her husband. The husband brought an action of crim. con. against Captain *Cristall* of the same service, preparatory to applying to the House of Lords for a divorce. The lady's paramour had no desire to pay damages, and, upon the authority of the case twice cited, *the Queen v. Millis*, called upon the husband to prove his marriage by common law. In this the husband failed, no priest having intervened. The husband, it may be said, was relieved of much trouble and expense; but let us consider the case of the children who were being educated at the family mansion in —shire, Scotland. The eldest being a boy entering his teens, supposed to have been the presumptive heir to a baronetcy, now branded with disgrace, sneered at by those who had previously delighted to honour him; we may imagine the feelings of the good old baronet, who had been accustomed to look upon his grandchild as his probable heir. No affection on his part can confer upon his grandson the title which now, through the decision of *the Queen v. Millis*, becomes an unenviable encumbrance."

In conclusion, his Honor stated that he was the more induced to notice this case, because there was what appeared to be an authentic version of it in a recent number of the *Sydney Herald*, copied from the *Bombay Herald*.

Conviction affirmed.

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REGINA v. KNIGHT. (1)

April 12.

Stephen C.J.
Dickinson J.
and

Therry J.

Insolvent Act—5 Vic., No. 17, s. 73—"Any insolvent"—*Fraudulent concealment of property.*

The indictment of an insolvent, under section 73 of the Insolvent Act, for fraudulent concealment and removal of part of his estate, is not substantially defective for want of an allegation that he was in fact insolvent at the time of such concealment and removal. The word "Insolvent," used as a substantive, is throughout the Act, invariably used as indicating simply the person of the debtor, whose estate has been, or is sought to be sequestrated, without regard to the fact of insolvency at any time.

An omission to state the value of the goods in the information is cured by verdict.

It is no objection that the creditors defrauded were not named therein.

THE prisoner was indicted for having removed part of his effects, &c., contrary to the 73rd section of the Insolvent Act, with intent to defraud his creditors. The information contained two counts; the first alleged a single taking at one time of goods to the value of 40s. on a certain day. The second count alleged that the prisoner on the day and year last aforesaid (being the day mentioned in the first count) embezzled, &c., goods to the value of £10 "at different times." At the trial, evidence was admitted in support of the second count of several takings on different days. This evidence being objected to, the point was reserved, and on Jan. 3,

Broadhurst appeared in support of the objection.

The COURT held the evidence was properly received.

Broadhurst, moved in arrest of judgment. Both counts of the information were defective in not alleging positively that the prisoner was in insolvent circumstances at the time of the commission of the alleged offence. The word "insolvent" was not a word of designation, but of *status*—*Rex v. Jones* (2). Secondly, no value was assigned in the information to each article alleged to have been removed—*Forsyth's case* (3). Thirdly, the creditors who were defrauded, or were to be defrauded, were not named in the information.

(1) *The Sydney Morning Herald*, Jan. 5, April 6 and 13, 1850; 1 S.C.R. App. 51; Cited 2 S.C.R. 151; 5 S.C.R. 81. (2) 4 B. & Ad. 342. (3) R. & Ry. 274.

The COURT held that the second objection was not now tenable, inasmuch as, if ever a good one, it was cured by aid of the verdict.

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The CHIEF JUSTICE said that as to the last point, the same objection had been overruled by him some years before, in a case at Bathurst.

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Fisher, in support of the information.

Cur. adv. vult.

The judgment of the Court was delivered on April 12, by—

The CHIEF JUSTICE. In this case the prisoner stands convicted under s. 73 of the Insolvency Act of the offence there termed fraudulent insolvency, by having, before the sequestration, removed and concealed part of his estate, with intent to defraud his creditors, and it is objected in arrest of judgment, that the indictment is substantially defective, and the charge against the prisoner incomplete, for the want of an allegation that he was in fact insolvent, at the time of such concealment and removal. There were other objections of a formal kind, but these were disposed of during the argument. The question now for decision is entirely one of substance, depending on the true intent and meaning of the enactment, by which the offence is created, and under which the indictment is framed.

The words of the section (so far as it is material to this case to state them) are as follows:—"If any insolvent, whose estate shall be surrendered or adjudged to be sequestered as insolvent, shall, whether before or after sequestration, have alienated, transferred, given, surrendered, delivered, mortgaged, or pledged, or have embezzled, concealed, retained, or removed, any part of his estate, moneys, or effects, to the value of forty shillings at any one time, or at different times to the value of ten pounds, with intent to defraud his creditors . . . he shall be deemed guilty of the crime of fraudulent insolvency, and, on conviction thereof, shall suffer transportation" or imprisonment, for certain periods in that behalf specified. It was submitted for the prisoner, that this enactment only renders punishable acts of alienation, delivery, concealment, or removal, &c., by a person who is *insolvent* (that is, in circumstances of insolvency) *at the time*. On the other hand, it was contended that the words "any insolvent" were used as designating the *person*, and not the state of circumstances, of the debtor, and that any debtor who should have fraudulently removed or concealed property, to the amount specified, before sequestration of his estate, whether then in circumstances of insolvency or not, would, immediately upon such sequestration, become amenable to the prescribed punishment.

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We have fully considered this case, and after consulting the authorities, and referring to the various clauses of the Act, which seemed to us more or less to bear on the question, we have finally arrived at the conclusion that the information against this prisoner must be sustained. The words of the section, it is clear, may as readily be applied to a removal, alienation, or concealment, accomplished while the debtor is solvent, as to the same act done in circumstances of insolvency. Let us then consider the object of the enactment, which is obviously the prevention of frauds on creditors, by the abstraction of property at any time to their injury. That object can only be effectually attained by including every such act, whatever may then have been the debtor's circumstances. A solvent man, we may admit, will be less likely to commit such a fraud than one suffering under embarrassments ; but, if committed, the consequences to the creditor in either case would be the same. By paying his debts the former might be reduced to the same poverty as if insolvent. By transferring a thousand pounds' worth of property to an accomplice he may secure that amount for his own use ; and an insolvent man, by the same act, could do no more. The insolvent man might do it simply to serve himself ; the solvent man, rendering himself insolvent by the process, might do it to spite a particular creditor. But in either case, as the injury is equal, so in its essence is the crime. The test of the offence is the intent to defraud creditors. If there be no creditor there clearly can be no crime. In like manner, if the debtor do not become an Insolvent, the law, which was passed only to affect persons answering that description will not affect him. But if he be "an Insolvent," and if he shall have abstracted or concealed property at any time while indebted, with intent to defraud any such creditors or creditor, we think that, since the words of the law embrace the fraud, they ought not to be restrained from embracing it, merely because he was, in point of fact, solvent at the time of such fraud. The enactment does not say that the debtor must then have been insolvent ; and, as we conceive, there was no reason for such a provision. On no principle, then, could the construction contended for by the prisoner be adopted.

It is hardly necessary to observe that Courts are not to *narrow* the construction of penal any more than of other statutes. In the language of Mr. Justice *Buller*, in *Hodnett's case*, "We are to look to the words in the first instance ; and, where they are plain, to decide on them. If they be doubtful we are then to have recourse to the subject-matter." (4) 1 T.R. 96. "In construing penal statutes, we must not, by refining,

defeat the obvious intent of the legislature." (5) All that appears to be meant, therefore, by the rule that penal statutes receive a strict construction is this, that they shall in no case be extended beyond the words by what in civil cases would be called an equitable construction. And yet, in respect of penal as well as other statutes, the word "master" has been holden equally to mean a "mistress," although this went to create a treason. (6)

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The only question, therefore, in this case is "what is the meaning of the words used." And it appears to us that the words "any Insolvent" in s. 73 mean, naturally, if not necessarily, a person whose estate has been sequestered. They cannot mean merely a person who was or is in circumstances of insolvency. It is clear that such a person (unless he has also been declared insolvent, or adjudged to have committed an act of insolvency) would not be within the enactment. The word "insolvent," used as adjective, may relate either to the person, or the circumstances of the person, according to the context. But when used as a substantive, as in s. 73 it plainly is, it is a term descriptive necessarily of the person only. We talk of a debtor as insolvent, when we mean that his assets will not equal the demands on them. But every one who speaks of *an* Insolvent means a debtor whose estate is (in common parlance) in the Insolvent Court. The position maintained for the prisoner, however, is that he must not only be an Insolvent, in this its ordinary sense, but also have been insolvent at the time of the fraud. If this construction be adopted, the word will be treated both as an adjective and a substantive, at one and the same time; and, in effect, new words will be introduced into the enactment. The case of *Rex v. Jones* (7) was cited as an authority. But all which that case decides is that the words "such bankrupt" in a similar enactment (the 6 Geo. IV, c. 16, s. 112) meant not merely a person adjudged a Bankrupt, but legally and effectually so adjudged. That clearly supplies no guide on the present question. The case would have been in point, had it decided that the words meant a person who had at the time of the fraud committed an act of bankruptcy. In the English statute, a debtor whose estate is duly sequestered is termed a Bankrupt. In our law, framed (for the most part) on the same principles, he is called an Insolvent. In both the term is an arbitrary one, meaning substantially the same thing. But the arbitrary and technical meaning in our Act is not to be confounded with the ordinary or popular one, merely because the same word may be used to express both.

(5) Dwar & Am. on Statutes, 635. (6) Plowden 86. (7) 5 B. & Ad. 342.

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There are other reasons for holding that the insolvency of the debtor, at the time of the removal or concealment, is not a necessary ingredient in the offence. From the clauses relating to Compulsory Sequestration (which are analogous to similar provisions in the Bankruptcy Acts) it is clear that a debtor may be made an Insolvent by committing *an act of insolvency*, although he may never have been insolvent at any time. Yet it is equally clear that the enactment in s. 73, if his estate have been duly sequestrated, will extend to such a person. By the express terms of the section, every Insolvent is within it whose estate shall either have been "surrendered" or have been "adjudged to be sequestrated." No one will contend that if an "act of insolvency" has been committed by a debtor, his actual solvency any more than the solvency of a debtor in England, who being also a trader, has committed an "act of bankruptcy" there, could be set up as a bar to the sequestration. Consequently, if never insolvent such a debtor would (according to the construction contended for) be out of the provisions of s. 73 altogether. For, whatever the meaning of the words "any Insolvent" in the first portion of the clause, the same must be their meaning in every other part; the word "such" being always subsequently introduced, throughout the section. But, as to the offences mentioned in the latter part of the enactment, *they* at any rate have no reference to the debtor's circumstances; and yet, if the word "Insolvent" *there* includes every person whose estate is sequestrated, why should it bear a more restricted meaning in the first portion? Lastly, however, if we adopt the meaning contended for, by reading the words "any Insolvent" as equivalent to the words "any person being insolvent," the time to which the enactment has relation is still, or may be, according to the grammatical construction, a time antecedent. So that, after all, the debtor need not be insolvent at the time of the fraud committed; which, however, was the point to be demonstrated.

We may add that, so far as we can discover, the word "Insolvent"—used as a substantive—is, throughout the Act, invariably used as indicating, simply, the person of a debtor, whose estate has been, or is sought to be sequestrated; without regard to the fact of insolvency at any time, or at all events, at the time referred to in the enactment. We may mention, for instance, sections 3, 12, 37, 46, 70, and 84, and particularly the 3rd; in which the term is applied to a debtor seeking sequestration, although, at the time, the fact of his insolvency is supposed to be not only unknown, but is a matter of specific question and enquiry.

Information sustained.

In re HIBBERD. (1)*In re* WHITTAKER.*Recognizance—Estreat—Fictitious surety.*

1850,

April 9.

Stephen C.J.
Dickinson J.
and
Therry J.

Recognizances, entered into before a Judge of the Supreme Court, exercising a discretion, are valid, notwithstanding they contain a clause, authorising the Attorney-General to appoint another time and place than those actually specified in them.

On its appearing that the address given by a surety was fictitious, the Court ordered an *alias* summons to issue.

In these matters, *Hibberd* and *Whittaker* were sureties for the appearance of a Mrs. C. S. Hughes Hallett, to take her trial. She not appearing the sureties' recognizances were estreated, which fact was now certified to the Court by the *Prothonotary*. A question having arisen as to whether the recognizances were good, containing as they did, a clause empowering the Attorney-General to appoint a time and place, other than that mentioned, and whether the sureties' liability was affected thereby, the point was reserved.

In regard to *Whittaker*, the *Attorney-General* said it had been reported to him by the Sheriff's officer, that though this person had described himself as a baker, living in Phillip-street, it turned out that no such person lived there.

The CHIEF JUSTICE said, that all that could be done at present in this case was to issue an *alias* writ of summons. If the party should be fictitious, and if the perpetrators of the fraud could be discovered, he would be liable to punishment. If the attorney had been guilty of negligence in the matter, then the *Attorney-General* might make another application against him to the Court.

On the following day the Court delivered judgment on the point reserved.

Their Honors were all of opinion, having looked into the forms, that the recognizances having been entered into before a Judge of the Supreme Court, exercising a discretion, were valid, notwithstanding they contained a clause authorising the Attorney-General to appoint another time and place than those actually specified in them. As to whether recognizances, in that form, entered into before the magistrates, would be valid, their Honors refrained from giving any opinion.

(1) *The Sydney Morning Herald*, April 9 and 10, 1850.

1850.

REGINA v. EGAN. (1)

April 8.

Stephen C.J.
Dickinson J.
and
Therry J.

Mandamus—Boxing match—Informer—9 Geo. IV, No. 14, s. 1—Licensed entertainment.

An entertainment, in the nature of a boxing match, in a private house, to which admission is charged, is within the Act, 9 Geo. IV, No. 14, s. 1.

An information may be laid by a Police Officer, or any other person, in matters where the public is concerned.

IN this case a rule *nisi* had been obtained, calling upon the defendants, magistrates, to show cause why a writ of *mandamus* should not go against them to compel them to hear an information against one *Hulle*, for giving an entertainment, in the nature of a boxing match, in his house, without a license in that behalf, and contrary to the provisions of the 9 Geo. IV, No. 14. The magistrates had refused to entertain the information, on the ground that it did not come within the Act.

The *Solicitor-General* now moved to make the rule absolute, contending that a boxing match, to see which a party was charged 2s. 6d., came clearly within the objects and provisions of the Act.

No one appeared to show cause, but *Foster*, as *amicus curiæ*, suggested that Inspector *Wearing*, the prosecutor, was not the proper party to put the magistrates in motion.

Their HONORS now decided as they had done before in the case of *the Queen v. Innis* (2) some time since, that where the public is concerned by the offence committed, then any one may give the necessary information; but where private persons are only injured, the penalty only going to them, they only can be informers in that behalf. Their Honors further decided, that the offence mentioned in the information was clearly within the words and meaning of the section recited.

Rule absolute.

(1) *The Sydney Morning Herald*, April 9, 1850. (2) *The Sydney Morning Herald*, July 17, 20, and 26, 1849.

DOE *dem.* M'CABE v. STUBBS. (1)

1850.

*New trial—Agreement of Counsel.**April 13.*Stephen C.J.
Dickinson J.
and
Therry J.

Where counsel agreed that the facts should be found by the jury, and the verdict thereon be determined by the Full Court, *held* defendant could not move for a new trial. (*Per the Chief Justice and Dickinson, J., Therry, J. dissente*).

IN the course of the trial of this case it was agreed on either side, that the jury should find certain facts, and then that upon the evidence, and upon those facts so found, the Full Court was to determine which way the verdict should be entered. The jury found all the facts against the defendant, and a verdict *pro forma* was entered then for the plaintiff. Notwithstanding this the defendants filed a notice for a new trial.

Foster and Fisher, for the defendant, moved for a new trial (the evidence having been read). The agreement at the trial ought not to be held of that binding force, so as to preclude the defendant from moving for a new trial, as the jury had found some of the facts contrary to the evidence, and to the surprise of both sides. Such was not in the contemplation of either party. A waiver of the right to move could not be implied from the terms of the agreement.

Broadhurst, contra.

THE CHIEF JUSTICE said, that a motion for a new trial in this case was a violation of the terms of the agreement. It may be that the result that has happened was never contemplated by either party; the agreement was a most improvident one, and he for one would not say that in all cases where an improvident agreement had been entered into in the haste and course of the trial, that there was no power in the Court to relieve a party from his position, the more especially as it might turn out, if such were not done, the ends of justice would be frustrated. That there was such a power was consistent with common-sense, so that if this case were other than an action of ejectment, which is not final, said His Honor, he was of opinion, considering the result of the finding, that a new trial ought to be granted on payment of costs. But as the action is an action of ejectment, it is better to abide strictly by the terms of the agreement and refuse to hear a motion for a new trial, as being

(1) *The Sydney Morning Herald*, April 15, 1850.

1850. in violation of it. It was better in all cases to adhere to an agreement solemnly entered into, unless indeed, as he thought, it was manifest if such a course were pursued justice would irrevocably be defeated.

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Stephen C. J. DICKINSON, J., was of opinion, that the Court ought not to entertain a motion for a new trial, simply because it was in direct violation of the agreement entered into at the trial.

TERRY, J., stated, that he regretted he could not concur in the judgment of the majority of the Court. He did not think when the defendants' counsel entered into the agreement at the trial, he intended to abandon his right to move for a new trial. The agreement appeared to have been entered into in anticipation that some points may have been found for the plaintiff, and some for the defendants. All the points, however, being found one way, the interference of the Court either became unnecessary altogether, or could only be exercised as a matter of course by entering a verdict for the plaintiff. Substantially, then, the result is a verdict for the plaintiff. And if the verdict be not regarded as a special verdict, which it was not, and as there were no words in the agreement that amounted to a waiver of a right to move for a new trial, or that excluded the right to move for one, he saw no substantial reason why the dissatisfied party should not be allowed to apply for a new trial, as in an ordinary case.

Entry of verdict for the plaintiff ordered.

REGINA v. BRUCE. (1)

1850.

Right of Reply by the Crown.

April 19.Stephen C.J.
Dickinson J.
and
Therry J.

The Crown has the right of reply, although no witnesses have been called, and the jury has not been addressed, by the prisoner's counsel. (*Per the Chief Justice and Therry, J., Dickinson, J., dissentiente.*)

SPECIAL case, in which the point raised was whether, at a trial of a criminal nature, the Attorney-General, or those prosecuting on his behalf, had the right, though the prisoner's counsel did not call witnesses, or even address the jury, but simply cross-examined the witnesses, to again address the jury on behalf of the Crown, by way of reply.

Holroyd, for the prisoner, cited *the King v. Marsden* (2); and *the Queen v. Gardner* (3).

The Attorney-General relied on the practice of the Court.

The CHIEF JUSTICE said he could not see any reason why, according to the cases cited, the Solicitor-General had not in this instance the right to reply. It may be difficult to assign any principle for this right, except that it was accorded, because as the Attorney-General prosecuted on the part of the colony at large, he should be clothed with that right to prevent justice from being defeated by some error, &c., that may have occurred in the course of the trial, and which ought to be explained and set right. That privilege had been generally acquiesced in, and no case to-day had been cited to take the one in question out of the operation and effect of that privilege.

DICKINSON, J., said he did not concur in the above judgment. Regarding civil suits between subject and subject, the privilege did not exist for the plaintiff's counsel to reply where no evidence was offered for the defendant; in criminal cases, however, a greater privilege was extended to those representing the Crown, because they could reply, as the cases cited proved, even where no evidence was given on the part of the prisoner. No case had been cited warranting the extension of that privilege, as now asked for, and he felt very unwilling to do so.

(1) *The Sydney Morning Herald*, April 20, 1850. (2) Moo. & Malk, 439.
(3) 1 C. & Kir. 628.

1850. TERRY, J., said he was of opinion that those prosecuting on the
REGINA part of the Crown had the right or prerogative to address the jury, even
" although no speech were made for the defence, and no evidence called.
BRUCE. He could well imagine that a skilful cross-examination of the witnesses
for the Crown might be as effective, if not more so, towards an acquittal,
as if a speech had been made, and the effect so produced might require
explanation on the part of the Crown.

Conviction sustained.

REGINA v. CLARKSON. (1)

1850.

Exhumation of Body—Coroner.

April 25.

Stephen C.J.
Dickinson J.
and
Therry J.

The Supreme Court has jurisdiction to order the exhumation of a body, for the purpose of a *post mortem* examination, although an inquest has already been held.

IN this matter the *Attorney-General* moved that permission be granted by the Court for the exhumation of the body of the late *Jemima Clarkson*, as there was some doubt whether the Coroner had power to order the same. Two inquests had already been held.

The *Attorney-General* said he did not wish a fresh inquisition, but merely for fresh evidence, to clear up all doubts as to the guilt or innocence of the prisoner. He moved that the Court grant the leave, and order the inquisition to be quashed. *Hawkin's Practice*, *Grady and Scotland's Practice*; *Rex v. Saunders* (2); *Reg. v. Clerk* (3); *In re Culley* (4).

The CHIEF JUSTICE delivered the judgment of the Court—after taking time to consider.

HIS HONOR said, in ordinary cases, the Court would order the Sheriff to carry out any order of the Court. However, without disclaiming jurisdiction but without asserting it over the Coroner, they would order the Coroner in this instance, as being a party to the application, to carry out the order the Court intended to make. From the cases cited, it was plain, this Court being the grand conservators of the peace, and as sovereign coroners of the colony had the power to grant the order as asked, for the ends of public justice, and that criminal justice be done. The order would be, that the body be exhumed; as soon as the examination is completed (which ought to take place as near to the burial ground as possible for obvious reasons) the body be immediately reinterred. Seeing that the Coroner is now *functus officio*, and that the magistrates not having initiated the enquiry, would have no jurisdiction, the Court would make no order as to how the examinations of the chemists should take place. This they would leave to the *Attorney-General* to conduct as he might think proper—he, they thought, had the power to call the parties before him and examine them. But if he declined that course thinking he had not the power, there was another course left—viz., for those persons to make a solemn declaration as to the information they may have gathered.

Order accordingly.

(1) *The Sydney Morning Herald*, April 26, 1850. (2) 1 Strange 167.

(3) 1 Salkeld 377. (4) 2 N. and M. 61.

1850.

SMITH v. NASH. (1)

July 8.

Stephen C.J.
Dickinson J.
and
Therry J

Slander—Demurrer—Surplusage—Privilege of witness—Reasonable and probable cause—Express malice.

A declaration on a verbal slander was resolvable into the following three averments:—1st. That the defendant maliciously said of the plaintiff, that he would not take the plaintiff's word on oath. 2nd. That the defendant said so during a trial, in which the plaintiff was a witness. 3rd. That the defendant said those words in certain evidence upon that trial, which he spontaneously, officiously, and maliciously gave. The defendant demurred on the ground, that an action would not lie for defamation under the circumstances alleged; that it ought to have been alleged that the words were used without reasonable and probable cause; and that it ought to have been alleged that the defendant was actuated by express malice.

Held, the declaration would have been good, by the Act, 11 Vic., No. 13, had it merely set forth the words complained of, and was not vitiated by the statement of the manner and occasion of the defamation, which were merely surplusage, and no ground for a demurrer. [*Note to Hodgson v. Scarlett* (2) *dissented from*.] A malicious defamation is not absolutely privileged by being published in a Court of Justice.

THE judgment of the Court was delivered by—

DICKINSON, J. The question in this case comes before us on demurrer to the 1st count of the declaration, which is for verbal slander, founded on the Act, 11 Vic., No. 13, s. 1.

The count states that after the passing of the said Act, and before the speaking of the words, the plaintiff had been examined as a witness for the Crown, upon the trial of one *Mary Douglass*, for felony, in the Court of Quarter Sessions; and that he then gave just and true evidence. Yet the defendant, in certain evidence which he spontaneously, officiously, and maliciously tendered and gave to the said Court, upon the said trial, of and concerning the plaintiff, and the evidence so given, falsely and maliciously spoke and published concerning the plaintiff and the evidence so given, the false, scandalous, malicious, and defamatory words following: that is to say, "I (meaning himself, the defendant) would not take *Henry Smith's* (meaning the plaintiff's) word upon oath."

The grounds of demurrer stated in the margin, were the following:—That an action would not lie against an individual, for uttering matter

(1) *The Sydney Morning Herald*, April 27, July 10, 1850.

(2) 1 B. and Ald. 246.

defamatory of another under the circumstances stated, and that it ought to have been alleged that the defendant used the language imputed to him, without having any reasonable or probable cause for such evidence as he is charged with having given; and that it ought to have been alleged that the defendant, in giving his said evidence, was actuated by express malice.

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The case was argued by Mr. *Broadhurst* for the defendant, and by the *Solicitor-General* for the plaintiff. The following cases and authorities were cited: *Starkie on Slander*, 242, 244; *Astley v. Younge* (3); *Hodgson v. Scarlett* (4); *Hearne v. Stowell* (5); and *Johnson v. Evans* (6).

We have considered this case, and have consulted the authorities cited. The statement in the count demurred to may be resolved into three averments:—1st. That the defendant maliciously said of the plaintiff, "I would not take *Henry Smith's* word on oath." 2nd. That the defendant said so during a trial, in which the plaintiff was a witness. 3rd. That the defendant said those words, in certain evidence upon that trial, which he spontaneously, officiously, and maliciously gave. The first of these we consider to be a statement of a *prima facie* cause of action; the second to be evidence in destruction of that right; the third as matter in rebuttal of the second, and in support of the first.

By the common law the words complained of, being expressive only of the defendant's disparaging opinion of the plaintiff's veracity, and not imputing that the latter had actually committed perjury would not under any circumstances have been actionable, unless the plaintiff had sustained some special injury from their utterance. The Colonial Act, however, by subjecting oral to the same liability as that which was by common law attached to written defamation, has rendered such words actionable (unless spoken under special circumstances) inasmuch as they are clearly injurious to the plaintiff's character.

We have considered with great attention the argument of Mr. *Broadhurst*, that the declaration should have alleged, that the defendant spoke the defamatory words without reasonable or probable cause. We have examined particularly the note to the case of *Hodgson v. Scarlett*, and the authorities therein cited, to which he directed our attention. Had the first count of the declaration merely stated that the defendant maliciously said of the plaintiff, "I would not take *Henry Smith's* word on oath," it would have disclosed a good *prima facie* cause of

(3) 2 Burr. 807.

(4) 1 B. & Ald. 246, note and cases there.

(5) 12 Ad. & El. 730.

(6) 3 Esp. 33.

1850. action. For to maintain a declaration for a Tort, the plaintiff must show that the defendant was a wrong-doer, that is, that he committed such an act, as in itself, in the absence of any explanation from him, evinces that he was *malo animo* actuated in the transaction. Now, defamation is an act apparently so wrongful, as in itself to raise (that immediate presumption of express ill-will which constitutes the implication of) legal malice, or, as it is otherwise called, malice in law. But, on the other hand, a prosecution is apparently so meritorious, that the legal implication of malice cannot arise from the statement of its existence, unless it is also averred that the prosecution was commenced without any probable cause for its instigation. Hence the necessity for the averment of want of probable cause in a declaration for a malicious prosecution, affords no argument for the same averment in a declaration for defamation. Being then of opinion, that the first count of the declaration would have been good by virtue of the local Act, had it merely set forth the words complained of, we further think that it is not vitiated by the statement of the manner and occasion of the defamation. For being unnecessary to the declaration, they are merely surplusage, which is no ground for a demurrer.

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We think that there is nothing in the authorities cited in the note to *Hodgson v. Scarlett*, to make us distrustful of the opinion we have expressed, on the validity of the first count of the declaration in this respect. For the question now before us is not the value of express malice, and of want of probable cause, as ingredients in this action, but whether averments of their existence are material to the said first count. Of the four cases cited in the note to *Hodgson v. Scarlett*, two of them (*Johnstone v. Sutton* and *Beauchamp v. Croft*) were actions for malicious prosecutions; to which, as we have shown, the absence of probable cause was indispensable. Another, *Astley v. Young*, was for a "false and malicious libel," contained in an affidavit; which complaint the defendant confessed and avoided by a plea, which stated, "that he made the affidavit in his own defence in the course of justice." To this plea there was a demurrer, and judgment was given for the plaintiff. With due submission, we cannot agree with the learned annotators, "that this is a strong authority to show, that an action as for defamation, although the words were *maliciously* spoken or written, does not lie, when they are spoken in a Court of Justice." For the only malice confessed by the plea in that case was the *malice in law*, which was necessarily implied from the words complained of, and which need not have been stated in the declaration at all, to strengthen its validity in point of substance. The other case was that cited by Mr. Justice *Holroyd*,

from *Rolle's Abridgment*. It was an action on the case in which the plaintiff declared that the defendant falsely and maliciously swore in a Court of Justice, about an affidavit made by the plaintiff, "There is not a word true in that affidavit, and I will prove it by forty witnesses." It was holden in arrest of judgment, that the action was not maintainable; for this reason, "that the defendant spoke of the plaintiff's affidavit as he did, in a legal way, and in self-defence." Now, the question considered by the Judges in that case, for all that appears by the report, may have been, not whether the declaration was vitiated by prematurely alleging certain matters of defence, but whether such facts as were therein set forth entitled the plaintiff to judgment. In that case it appeared on the pleadings that the defendant spoke the words on a justifiable occasion, and there was nothing on record to show that they were spoken with express malice. In that case the Court may have considered the facts stated merely in respect to their materiality to the action rather than to the declaration, to which distinction their attention may not have been directed. We cannot conceive that the Court intended in that case to lay down the rule that the mere speaking in a Court of Justice, however malicious in fact, is a sufficient excuse for a gross slander; for then the justification would have been complete, however destitute the defendant might have been of probable cause for his observation. All that they could have meant was that the plaintiff on the record before them had stated nothing to rebut that absence of malice which was implied by law in favour of the defendant from the occasion of his speaking, as shown on the record. And we therefore cannot agree with the Reporters of 1 B. and Ald: "that this case from *Rolle* shows that words, although false and malicious, if spoken in a Court of Justice, are not the subject of an action of slander." For the words *falsely and maliciously* being, in a declaration, mere matters of legal intendment and implication, are not necessary to make a count good in substance, as appears to have been the opinion of *Rolle* C. J. in a case in *Styles*. According to that authority, the absence of the allegations of falsehood and malice in a declaration for defamation is merely informal; inasmuch as we think the omission curable by pleading over, and not by verdict (as suggested at p. 242 of 1 *Vghn. Wms. Saund.*), which can only obviate the omission in the declaration of a substantial fact, when it contains words sufficiently general for a reasonable intendment, that the omission must have been supplied at the trial, to warrant the verdict on the record; and, independently of the words themselves, there are none in ordinary declarations for slander which can by any intendment comprise the words "*falsely and maliciously*."

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 SMITH
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Dickinson J.

1850. For the foregoing reasons we consider that the first count of the
SMITH declaration before us is not open to demurrer, for not averring that the
v. defendant spoke the words complained of, without reasonable or probable
NASH. cause.
Dickinson J.

In dealing with the objection, that the first count should have alleged, that the defendant spoke the words without probable cause, we have anticipated many of the observations which are applicable to the argument, that the declaration ought to have alleged express malice in the defendant's speaking. But as an action against a man, for what he spoke as a witness in a court of justice is, as far as we can ascertain, of the first impression, we think it expedient to consider the objection as to the absence of any averment of express malice, with the same particularity as if the other objection had not been made.

We are of opinion that the first count is not defective for not averring the existence of *express malice*. The first of the three averments, into which we have resolved the first count, not only states that the plaintiff spoke the words, but that he spoke them maliciously. Now, as to that, the law is thus distinctly laid down, in 1 *Vn. Wms. Saund.*, p. 130, note (d): "The existence of malice is not a question for the jury in an ordinary case of slander; for the law implies such malice, as is necessary to maintain the action. But for words spoken, or libels published, confidentially, and other privileged communications, no action lies, unless express malice can be proved, or inferred from the circumstances; and the question of malice is then a necessary part of the Jury's inquiry. For the meaning, in law, of a privileged communication is a communication made on such an occasion as rebuts the *prima facie* inference of malice arising from the publication of matter prejudicial to the character of the plaintiff, and throws on him the *onus* of proving malice in fact, i.e., that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made.

However, we think that the first count is not defective, for not averring the existence of *express malice*. For, as the whole question of malice, express or implied, is by the usual course of pleading to be considered by the Judge and Jury under the General Issue, it can only, in the instance before us, be considered an averment essential to the count, by reason of the occasion of the speaking therein mentioned. But that statement as to the occasion we think we must hold as *virtually* non-existing in the count; for otherwise that occasion would, by this demurrer, be excluded from the consideration of a Jury; which would

be repugnant to the plain intention of the late Act—by the second section of which it is enacted “That on the trial of any action for defamatory words, not imputing an indictable offence, it shall be competent to the Jury, under the plea of not guilty, to consider whether the words set forth in the declaration were spoken on an occasion when the plaintiff’s character was likely to be injured thereby ; and if the Jury shall be of opinion that the said words were spoken on an occasion when the plaintiff’s character was not likely to be injured thereby, to find a verdict for the defendant.” Such a phrase as “express malice,” moreover, as far as we are aware, is unknown to pleading language ; and, if the fact itself need not be alleged, its defect of form when unnecessarily averred cannot be a matter for demurrer. But, says the defendant, the plaintiff has himself created the necessity for the allegation ; and, instead of averring the fact, has merely stated evidence of it. For he has disclosed that the words were spoken on a justifiable occasion. He has therefore made out my defence for me, and has not answered it by showing that I then spoke the words with express malice, but only that I did so in a manner from which (though the Court cannot adjudge yet) a Jury might infer that I was actuated by such malicious motive. This argument, however, we consider to prove too much ; for, on the same reason that the words contained in the third averment are insufficient, as being only *evidence* of express malice, so those which are stated in the second are only argumentative, that the defendant did not maliciously speak the words complained of. The defendant may at the trial argue before the Jury, that he did not maliciously speak the words, from the plaintiff’s own admission that he was warranted by the occasion ; but we can no more adjudge the absence of malice in the defendant, from that admission, than we can the existence of express malice, from the way in which the plaintiff describes the evidence to have been given. Again, we consider the second and third averments, into which we have resolved the first count, as mere surplusage, which is in general no ground for demurrer, more especially in this case when it is not shown as cause for such proceeding. For if the defendant, instead of demurring, had pleaded the general issue, the plaintiff need not in the first instance have proved either of those matters ; for they can be struck out of the declaration, without also striking out the words complained of. They are not necessarily descriptive of the words complained of, as they might have been spoken on any other occasion than that mentioned ; and the defamation is too significant to require any inducement for their explanation. The words complained of would have comprised the whole substance of the issue, and the plaintiff need have proved no more.

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1850. *Digby v. Thompson* (7), *Williamson v. Allison* (8), *Rex v. Jones* (9),
 SMITH *Bristow v. Wright* (10), *Taylor on Evidence*, s. 166 to 175. Supposing,
 v. moreoever, that the plaintiff had, in the first count, specifically stated
 NASH. that the defendant spoke the words with express malice, the defendant
Dickinson J. could not have traversed it. For though such fact may not be immaterial
 to the cause, it is immaterial to the count; because, if its existence were
 a matter *pleadable* at all, its proper place on the record would be, in
 replication to a special plea by the defendant, that the words were
 spoken honestly or *bonâ fide* on a warrantable occasion (which, as it
 seems, may be done, *Cromwell's case* (11), *Smith v. Thomas* (12), 1 *Vn.*
Wms. Saund. 134), and the rule is clear that "a superfluous allegation
 prematurely made, in anticipation of some matter which may be subse-
 quently pleaded on the other side, need not be noticed by the other
 party, and is not traversable." 2 *Vgn. Wms. Saund.* 63 B.

Being then of opinion that the count need not have contained any
 allegation about express malice, the evidence thereof which it sets forth
 is no more than surplusage, and not the subject of demurrer. We
 therefore think that the plaintiff is entitled to our judgment; but the
 defendant, on the usual terms of paying costs, and pleading issuably,
 may withdraw his demurrer.

Declaration sustained. Leave to amend.

(7) 4 B. & Ad. 821. (8) 2 East 446. (9) 2 B. & Adol. 611. (10) 1 Smith, L.C. 334.
 (11) 4 Rep. 14 A. (12) 2 Bing. N.C. 372.

PICKERING v. MASON. (1)

1850.

July 8.

Libel—Publication of false news in newspaper—Inference of knowledge—Public benefit—Apology.

Stephen C.J.
Dickinson J.
and
Therry J.

The plaintiffs declared on a libel published by the defendant in his newspaper, and which charged the plaintiffs with having published false news in their newspaper from corrupt motives, to which the defendant pleaded—1st, a plea alleging that the plaintiffs published in their journal an article, &c., which was false, and that the plaintiffs so published it for corrupt, sordid, &c., purposes, and that the matter complained of was for the public benefit,—2nd, that the alleged libel was published by the defendant without actual malice, and without gross negligence, and that a full apology was published in the defendant's newspaper (written and signed by the author of the alleged libel), and that a certain sum had been paid into Court in full satisfaction. The plaintiff's demurred generally to the first plea; and specially to the second plea, upon the ground, among others, that the apology was made, not by the defendant, but by some other person.

Held, the first plea was good, inasmuch as, if the article, published by the plaintiffs, was false, and so published from corrupt motives, it must have been *false to their knowledge*, and if false, considering the subject-matter of the article, the defendant's publication must have been beneficial to the public.

The second plea was held bad on the ground stated above.

A person who knowingly publishes false news is not entitled to an action for damages, because the libel complained of visits him, individually, more severely than is necessary for the public advantage.

JUDGMENT in this case was delivered by—

DICKINSON, J. This case comes before us on demurrer to each of the defendant's pleas, in an action for libel. The declaration states, that when the grievance complained of was committed, the plaintiffs were proprietors of a newspaper called *Bell's Life in Sydney*, and that the defendant in a certain newspaper called the *Sydney Pickwick*, falsely and maliciously composed and published, of and concerning the plaintiff's, and of and concerning them as such proprietors of the said first-mentioned newspapers, and concerning the said first-mentioned newspaper, a libel containing amongst other things the following words :—

"A Public Lie. What can be more despicable than a lie? But when falsehood, by a vicious and depraved ingenuity is made a matter of trading speculation, when it is made a dodge for raising the wind, then does it not become thoroughly despicable? It is but three weeks since

(1) *The Sydney Morning Herald*, April 27, July 10, 1850.

1850. the proprietors of *Bell's Life in Sydney* (meaning the plaintiffs and the said newspaper so belonging to them as aforesaid) of course for a money-making *ruse*, announced through long placards, and a long thing they call an 'article,' that 'dreadful mortality' involving nothing short of the lives of forty individuals, had ensued on board a schooner, the 'Star of China,' which had sailed from this port for California. The *Herald* at the time pronounced the statement (by innuendo) to be nothing but a fabrication. The late news per Union from San Francisco proclaims this to be a fact. The passengers who sailed in the 'Star of China' arrived safe and sound, hale and hearty, at their golden destination. Yet *Bell's Life* (meaning the plaintiffs, as such proprietors of the said newspaper), for its own mean and avaricious purposes, endeavoured to mislead the public into the belief that a 'dreadful mortality' happened on board that vessel. When will treacherous falsehood like this stand rebuked?"

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To this declaration the defendant pleaded, first, that before the committing of the grievances, the plaintiffs, in the said newspaper, called *Bell's Life in Sydney*, did for corrupt, sordid, dishonest, and sinister purposes compose and publish false news of and concerning matters interesting and important to the public of the said colony: that is to say—"Dreadful mortality on board the 'Star of China,' schooner, 101 tons, sailed hence for California on the 28th June, with sixty-eight emigrants. A letter of which we subjoin an extract, has been received in Sydney from a passenger on board the 'Margaret,' brig, which sailed from this port for San Francisco on the 27th August. It is dated from Honolulu, one of the Sandwich Islands, where the latter vessel touched on her passage. "Honolulu, November 18th, 1849. Dear Mother,—I write these few lines to you, hoping to find you all in good health, as, thank God, it leaves me at present. We arrived here after a tedious passage, and are about 1,200 miles from California. There is a vessel here from there going to Sydney. There is bad news for them. They are dying very fast. There were forty people died in the passage down in the 'Star of China.' We shall be down about Christmas. The vessel is now starting, and I have not time to write more, but will write a long letter to you when I get down there.—I——W——." And the defendant by his pleas averred, that the public, and divers persons, relations, friends, and acquaintances, of the persons who went as passengers on the said voyage, from Sydney aforesaid to San Francisco aforesaid, in the said vessel called the "Star of China," believed the said last statement to be true, and published in honesty and good faith, and that it was for the public benefit to have undeceived them in that regard. Wherefore he, the said defendant, did compose and publish of

and concerning the plaintiffs, and of and concerning them as such proprietors as aforesaid, of the said newspaper called *Bell's Life in Sydney*, the said alleged libellous matter in the declaration mentioned, as he lawfully might for the cause aforesaid. And this the defendant is ready to verify.

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The defendant pleaded, secondly, that the libel was contained in a public newspaper published at Sydney aforesaid, to wit, *The Sydney Pickwick*, and was inserted in such newspaper without actual malice, and without gross negligence; and that, at the earliest opportunity after the commencement of this suit, to wit, on the twenty-third day of February, in the year of our Lord one thousand eight hundred and fifty, he the said defendant inserted in such last-mentioned newspaper, a full apology for the said alleged libel, which said apology was, in substance, and to the effect following—that is to say: “To the editors of *Bell's Life in Sydney*. Gentlemen,—With respect to a paragraph which appeared in the *Sydney Pickwick* of the 9th instant, reflecting upon an article which appeared in your journal about three weeks previous, setting forth that forty passengers had died on board the ‘*Star of China*,’ which had sailed from this port for California, I beg to state that I am the author of the paragraph in question. When writing it, I considered from the general circumstances of the case that I was warranted in commenting upon what I then believed (but which I have since had reason to think was not the fact) to be something more than a mistake on your part. If I have spoken too harshly, or have in any wise wounded your private feelings, or injured the reputation of your newspaper, I can only assure you that I am exceedingly sorry that I allowed myself to fall into such an error. I trust this apology will be satisfactory to yourselves personally and to the public in general. I am, gentlemen, your obedient servant, JOHN VAUGHAN.” And that the plaintiffs ought not further to maintain their action, because the defendant brought into Court, by leave of one of the judges thereof, the sum of fourpence ready to be paid to the plaintiffs; and that the plaintiffs had not sustained damage to a greater amount than the said sum of fourpence, in respect of the cause of action in the declaration mentioned.

The plaintiffs demurred generally to the first plea, and stated these points in the margin, namely, that the first plea was bad in law, inasmuch as it did not show the truth of the matters charged by the libel—there being no averment in the said plea, nor any allegation—from which it could be inferred that the news published by them as in that plea

1850. <hr/> PICKERING v. MASON. Dickinson J.	mentioned was false, or that if false, it was false to their knowledge : and that the plea did not set forth any matter, to show that it was for the public benefit that the defendant should publish the libel, and that for anything that appeared in the said plea, the public benefit would have been as well consulted and secured, by a simple contradiction of the news published by the plaintiffs, as by a contradiction coupled with slanderous imputations upon the plaintiffs' motives.
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The plaintiffs demurred specially to the second plea ; and assigned the following causes of demurrer ; that is to say, that, although the second plea was pleaded generally to the whole action, it set up a defence which had arisen since the commencement of the action, and therefore ought to have been pleaded in bar of the *further* maintainance only of the said action. And that the second plea, instead of showing that the apology, therein mentioned, was inserted in the said newspaper at the earliest opportunity after the publication of the said libel, merely stated that it was so inserted at the earliest opportunity after the commencement of the suit, without giving any reason or excuse for its not having been inserted sooner ; and that it did not appear that the said newspaper, in which the apology was alleged to have been inserted, was ever published, and that the said apology appears in and by the said plea, to have been an apology made, not by the defendant, but by some other person. The case was argued before us last term by Mr. *Broadhurst* for the plaintiffs, and by Mr. *Darvall* for the defendant.

We have considered these pleadings, and have referred to the authorities cited ; and we consider the first plea to be valid. For it states, that the plaintiffs published in their journal an article, purporting to be a letter containing such a report as that mentioned in the libel complained of. It alleges that the report was false, and that the plaintiffs so published it for "corrupt, sordid, dishonest, and sinister purposes"—of which conduct we cannot conceive they could have been guilty, if the report had not *been false to their knowledge*. If the report was false, the publication that it was so, we consider, must have been beneficial to the public ; as it is obvious that the propagation of rumours about particular voyages, in which individuals are interested, has a tendency to excite prejudices in the public, against adventures in the same direction. With respect to the objection that the libel is grosser than is excusable by reason of the beneficial effect of its contradiction, we think that a person who knowingly publishes false news is not entitled to an action for damages, because the libel complained of visits him individually more severely than is necessary for the public advantage.

To hold a defendant under such circumstances to have been a wrongdoer *ab initio* is too extensive and novel an application of the doctrine laid down in the *Six Carpenters' case* for us to advance. We, therefore, think the first plea good.

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We are of opinion that the second plea is bad, for, as the libel originally appeared, it went before the public as the assertion of the proprietors of the *Pickwick* paper; and, therefore, must have been more injurious to the plaintiffs than if it had appeared to have been the assertion of the individual John Vaughan, mentioned in the second plea. We think the defendants, to have made the apology complete, ought to have added to Vaughan's letter a paragraph expressive of their own sorrow for having inserted it, and stating that they fully acquitted the plaintiffs of the false conduct imputed to them. All that the apology amounts to is one for the composition of the libel by *the author*, and is not one for the publication of it by the defendants in their newspaper. As we are clearly of opinion that the second plea is bad upon this ground of insufficient apology, it is unnecessary for me to discuss the other points of demurrer assigned.

[IN EQUITY.]

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PHILLIPS v. HOLDEN. (1)

Oct. 14.

Stephen C. J.
Dickinson J.
and
Therry J.

54 Geo. III, c. 15, s. 4—*Married woman's debts—Liability of separate real estate after decease—"Belonging to."*

The question was whether the separate landed estate of a married woman was liable in the hands of her heir to the payment of simple contract debts, incurred by her during coverture, the deceased not having executed her power of appointment.

Held, the property belonged to the deceased within the meaning of the Act 54 Geo. III, c. 15, s. 4, and was, by the statute, in a case and for a purpose like the present, on the same footing, in the hands of a trustee or heir, exactly as personal estate in the hands of an executor (*per* the Chief Justice and Dickinson J., Therry J. *dubitante*).

THIS was an appeal from a decision of His Honor, Mr. Justice Therry, the Primary Judge in Equity. The suit was instituted by a creditor on behalf of herself and all others, against the trustee and heir-at-law of the late Mrs. *Huffington*, formerly *Bowman*. Mrs. *Bowman* on her intermarriage with *William Bowman* had certain real property settled upon her in strict settlement in the usual way, but had never executed her power of appointment, and made no will. The plaintiff's claim was on a promissory-note, given her by Mrs. *Bowman*, in payment of wages. His Honor dismissed the bill with costs, on the ground that the cases did not warrant a decree for the sale of the *corpus* of the estate to pay the plaintiff's debt, it being a simple contract debt, and Mrs. *Huffington* not having exercised her power of appointment. The plaintiff appealed and on July 4 the case came on for argument.

The *Solicitor-General*, for the appellants. The deceased in this case took under the settlement the remainder in fee, in default of appointment. *Owens v. Dickenson* (2). The *corpus* of the property might be followed into the hands of the heir. 54 Geo. III, c. 15.

Broadhurst, contra. The separate estate was merely in the rents and profits, and therefore the fee could not be dealt with by the Court.

Cur. adv. vult.

(1) *The Sydney Morning Herald*, July 5, Oct. 17, 1850.

(2) 1 Cr. & Ph. 53.

Judgment was delivered on October 14 by the *Chief Justice* (for himself and *Dickinson, J.*) and *Therry, J.*

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THE CHIEF JUSTICE. This is the case of a bill filed by a creditor, on behalf of herself and the other creditors of *Elizabeth Huffington* deceased, against the heir-at-law of the said *Elizabeth*, and the Trustee of certain landed estate which was settled to her separate use, to have the same declared liable to the payment of her debts, and that such debts may be paid by the sale or mortgage thereof or of so much as may be required for that purpose. The case came on for hearing, in the ordinary course, before the Primary Judge, when the bill was dismissed with costs, and from that decision the present Appeal was instituted.

The property in question was conveyed to the defendant *Holden*, in trust for the deceased, then the wife of *William Bowman*, for her life (the rents to be received by the trustee and paid over to her) and, on her death, for such persons and purposes as she should appoint; and, in default of such appointment, "to the use of her, the said *Elizabeth Bowman*, her heirs and assigns for ever." It appears that she contracted during her coverture several debts, of which the one to the Plaintiff was, after her second marriage, acknowledged by a promissory-note, under her hand, payable six months after date. Shortly after the maturity of that note Mrs. *Huffington* died intestate, and without having executed any appointment, either for payment of debts or otherwise. Under these circumstances Mr. Justice *Therry* thought that, on the authority of all the cases, the deceased's real estate could not be made chargeable, but that it descended to the heir, who in this case is an infant, unaffected by any of her engagements.

We cannot collect that the case below was rested on the peculiar effect in this colony of the 54 Geo. III, c. 15, s. 4; and the impression of his Honor is, that the point (which certainly is not alluded to in the judgment) was scarcely noticed on that occasion if at all. On the arguments before us, however, the operation of that enactment was the most prominent topic; and it was submitted that as personal estate in England, settled on a married woman, is liable in Equity for her debts, in the hands of an executor, and the statute puts real estate in New South Wales on the footing of chattels, for the purpose of satisfying debts; land is alike liable in equity, in a case of this kind, in the hands of the heir. Without an appointment or a charge by will, operating as an appointment, for payment of her debts, it was conceded that real estate in England, settled on the wife, would, in general, after her death, not be liable. But, in this case it is said, independently of the effect of the

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enactment, the *corpus* of the estate was virtually Mrs. *Bowman's* as much as the rents were. In her life time, no doubt, those alone could have been disposed of; but after her death the estate itself was disposable; she had a remainder in fee in the land, and her heir took by descent from her. Why, then, should he take it discharged from her debts? On the other hand, for the defendants, the English cases were maintained to be strictly applicable. It was contended that Equity acted on "separate" estate only; but that, by the wife's death, the nature of the interest was changed and the heir took the land unincumbered. The only separate estate was the *rents*; and the heir could not be liable as such for engagements which, being those of a married woman, were not legally binding, and, therefore, were never "debts" in the proper sense of the word.

The following cases and authorities were cited:—*Owens v. Dickenson* (3); *Murray v. Barlee* (4); *Stor. Eq. Jur.* s. 243; *Heatley v. Thomas* (5); *Peacock v. Monk* (6); *Norton v. Turvill* (7); *Anon* (8); *Hulme v. Tenant* (9); *Stuart v. Kirkwall* (10); *Bullpin v. Clarke* (11); *Field v. Sowle* (12); and *Aylett v. Ashton* (13).

We have considered this case, and we think that, but for the effect of the 54 Geo. III, c. 15, s. 4, the plaintiff could not have succeeded. The authorities, as was observed by the Primary Judge, so far as they apply to real estate in England, established the position contended for by the defendant that after the wife's death, the payment of such debts only will be enforced, as were charged by her on such estate. Those authorities, however (which are all collected in *White and Tudor's Leading Cases in Equity*, pages 324 to 343) clearly show that where a married woman has separate estate which *can* be made available to the payment of her debts, a Court of Equity will make it so available. "The general engagement of the wife" (says Lord *Thurlow*, in *Hulme v. Tenant*) "shall operate upon her personal property, shall apply to the rents and profits of her real estate, and her trustees shall be obliged to apply personal estate and rents and profits when they arise, to the satisfaction of such general engagement." Now personal property, settled upon a feme covert, 'for her separate use, is to be enjoyed with all its incidents; and as the *jus disponendi* is one of them, she may dispose of it, either by acts *inter vivos* or by will." (*White and Tudor's Notes*, 331, and cases there cited.) But, with respect to landed property,

(3) 1 Cr. & Ph. 53. (4) 3 M. & K. 233. (5) 15 Ves. 596. (6) 2 Ves. Senior 191. (7) 2 P. Wms. 144. (8) 18 Ves. 258. (9) 1 B. C. C. 17. (10) 3 Madd. 387. (11) 17 Ves. 365. (12) 4 Russ. 112. (13) 1 M. & Cr. 105.

the law was always different. A married woman could not, without an express power of appointment, dispose of her separate real estate, otherwise than by Fine or Recovery, which alone would bind the heir although she can convey or assign her *life interest* in land, the same as she can in her personal estate. For this we need hardly refer to any authority, but the cases will be found in the very useful work just mentioned, pp. 331 and 332.

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We may observe, as an additional ground for distinction in these cases of separate property, between personal and real estate, that one of the incidents of the former always was a liability for the satisfaction of debts; whereas that incident did not at law attach to the latter. The heir might, indeed, be rendered liable; but then it was by express contract.

It seems plainly to follow, that, where a married woman contracts debts, having separate estate, real or personal, or both, all the effect is given to her engagements, that, in such a state of things, by law can be given; and that, consequently, as to the personal estate, the whole is disposable to satisfy them, but of the real estate, the accruing income only during her life. To do more, as to the realty, would be in effect to make the wife execute a power of appointment, if she had one, or to defeat the heir, by less than that which the law has required for that purpose. It is settled, however, that the Courts appropriate the wife's separate property, where she has contracted debts, not by virtue of any supposed appointment, or specific appropriation, but simply because by no other means could payment of her debts be compelled. See Lord *Cottenham's* judgment, in *Owens v. Dickenson* (3), and Lord *Brougham's* in *Murray v. Barlee* (4).

We say "*her debts*" because such is the precise term by which both Lord *Thurlow* (in *Hulme v. Tenant*) and Lord *Cottenham* (in *Owens v. Dickenson*) speak of a wife's engagements. Unless such engagements or contracts, indeed, are debts, the decision in the last-mentioned case cannot be upheld; and common-sense rejects any other conclusion. The engagements of the wife, then, in Equity, are debts; and payment of them, so far as her personal estate is concerned, will be enforced in Equity, equally after her death, as it would have been in her lifetime. About this latter portion there has been no dispute, and the cases abundantly establish it.

We then come to the 54 Geo. III, c. 15, s. 4, and there find it enacted that all real estate in New South Wales, and its (then) dependencies, belonging to any person indebted, shall be liable to and chargeable with

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all just debts and demands, of what nature soever, and shall be assets for the satisfaction thereof, as real estates are in England liable to the satisfaction of debts due by specialty, and shall be subject to the like remedies and proceedings, in any Court of Law or Equity, for seizing, selling, or disposing of such real estate, and towards the satisfaction of such debts and demands, and in like manner, as personal estates in the said colony are seized, sold, or disposed of for the satisfaction of debts. It appears to us, that the effect of these very extensive words is to place real estate in the hands of a trustee or heir, in a case and for a purpose like the present, on the same footing exactly as personal estate in the hands of an executor. The latter species of property, it is admitted, would be liable to this plaintiff. Can it be doubted, then, that the statute makes the former equally liable?

The only point, as it seems to us, on which a doubt could arise, is, whether the property in question "*belonged*" to the wife, within the meaning of the enactment. We think that, for the purposes of that enactment, and in the eye of a Court of Equity, which, for all such purposes, regards a married woman as a feme sole, the property did belong to her. It could not, indeed (except as to the remainder, by way of fine, or under the power of appointment in that behalf) have been effectually conveyed during her life. In all other respects, however, it was as much her own as the personal estate was; and at her death it passed at once to her heir. At that moment, we conceive that it was her separate estate, and that it descended to him, charged with the payment of her debts. In England, the heir is not affected, unless the wife shall have charged her land, in some mode prescribed by law. But, in these colonies, as the statute makes real estate liable in every case where personal estate would have been, the distinction between the two species of property, for the purpose of satisfying debts, is at an end. This, then, is the case of a person who has died indebted, and the proceeding instituted, and remedy sought, are respectively to dispose of her estate for the satisfaction of her debts. Her personal estate, if any, may be so disposed of. Her real estate was, from the moment of her death, as completely disposable by her as was her personal estate. And why is not the same disposition, by this Court, to be made of the one, under the authority of the enactment, as of the other?

For the reasons thus assigned, we are of opinion that the plaintiff must have the decree asked for—a declaration, that the real estate is liable to the satisfaction of the plaintiff, and the other creditors of the deceased; and a reference to the Master, to inquire and report who are

such creditors, and what are their just claims severally, also, what estate is in the hands of the defendants and each of them, and how much thereof should be sold or mortgaged, to produce the amount which will be required. The rents and profits received by the Trustee in the deceased's lifetime, and still in his hands, if any, will of course be paid over. We can give no costs in respect of this appeal. All other costs and further directions are reserved.

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THERRY, J. Although not prepared to express a positive opinion, in dissent from the judgment, yet as there is one point of the case on which I entertain a doubt I deem it right to express it. My doubt arises from finding it stated in the case of *Monck v. Peacock* (14), that "a woman who has a real estate to her separate use *should not be in equity considered as the absolute owner of it.*" And agreeably to this dictum we invariably find, in England, that the inheritance of a married woman, having a full power of appointment, is not taken and applied as other separate estate. Now, if this is on the ground that the separate estate is gone at her death, or never existed, so far as the limitation of the fee subject to the power of appointment extends, then the construction of the statute 54 George III adopted by the Court, I apprehend, cannot be correct, because the clause in question is such as only attaches to separate estate, and that is gone or never existed. It may be, however, that the reason for excluding the inheritance is the favour shown to the heir, and the disinclination to disinherit him; and, if so, the statute would apply regarding the inheritance of a married woman, over which she has a power of appointment, as her separate estate, the statute, for the purpose of paying this claim, turning the real into personal estate.

My doubt, then, in this case is, whether the case of *Hulme v. Tenant* (15) turns on the principle of favour to an heir, whereby he is not to be charged, unless by means of the power being strictly and legally executed, or on the principle, that the remainder in fee vested in the married woman does not constitute separate estate, although she has power to appoint it as she pleases.

If the former is the ground of the decision, the estate being separate estate, the Act of 54 Geo. III applies; if the latter, that Act cannot apply, because there never was any separate estate, which the married woman could charge. I incline to the opinion that the true ground is the principle of favour shown to the heir, whereby he is not to be charged, unless by means of the power being strictly and legally executed, and if so, the judgment is alike in accordance with law, as with the natural justice of the case.

Decree reversed.

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THE BANK OF AUSTRALASIA v. MURRAY. (1)

Oct. 14.

Stephen C.J.
Dickinson J.
and
Therry J.

54 Geo. III, c. 15, s. 4—*Effect of admission of debt by executor—Liability of heir—Statute of Limitations.*

The existence of a debt, due by a deceased person, is not proved, as against his heir, by the admission of his executor, nor can the case be taken out of the Statute of Limitations thereby.

The statute, 54 Geo. III, c. 15, does not render land, in this colony, disposable, for the liquidation of debts, by an executor.

A creditor is not enabled, by 54 Geo. III, c. 15, to take lands, which descend on the heir, under a judgment and execution against the executor.

THE plaintiffs in this suit sought a sale of, or mortgage over, real property, which the defendant, *Bunn*, claimed as heir-at-law to his father, the late *George Bunn*. The latter died, intestate as to his real estate, in 1834 ; but as to his personalty made the defendant *Murray* his executor. Being largely indebted at the time of his death, his executor paid off a portion of the debt, and for the balance gave a promissory-note, made by himself as executor. This note having come into the hands of the plaintiffs, they sued *Murray*, and obtained a judgment against the assets of *Bunn*, both real and personal, *quando acciderint*. The bill stated that *Murray* had administered the whole of the personal assets of the deceased. The heir-at-law, by his guardian, set up as a defence the Statute of Limitations, but the executor submitted.

His Honor, the Primary Judge, in giving judgment, said that notwithstanding the 54 George III, c. 15, the real estate of an infant heir-at-law could not be bound by a judgment obtained against an executor in an action against the executor alone.

From this decision the plaintiffs appealed. The case having been argued on July 6 by the *Solicitor-General*, *Foster*, and *Broadhurst*, for the plaintiffs, and *Fisher* for the heir-at-law, *Dowling*, for the executor, submitting, the reserved judgment of the Court was delivered on Oct. 14 by

THE CHIEF JUSTICE. In this case one of the defendants is the executor, and the other is the heir-at-law, of *George Bunn*, deceased ; and the bill was filed by the Bank, as indorsees of a promissory-note given by the

(1) *The Sydney Morning Herald*, June 27, July 8, Oct. 19, 1850.

former, as such executor, and on which they have obtained judgment at law against him, to have the amount satisfied out of the deceased's real estate, the executor having no assets. The note was given about fourteen years ago, for the balance of a large sum of money, due (or supposed and admitted to be due) by the deceased, who was a merchant in this city, to his London correspondents, and the executor, it appears, from time to time, as the means arose, paid the interest and portions of the principal of the note, or renewed securities of the like nature, substituted for it, on the last of which the judgment in question was obtained against him of assets *quando acciderint*. The deceased died intestate as to his lands, and the heir was then, and until within the last few years, an infant. The plaintiffs now claim payment, as against both defendants, out of those lands, under the 54 George III, c. 15, s. 4, the provisions of which have been so recently stated from this place that it is unnecessary now to recapitulate them. The *Primary Judge*, however, dismissed the bill with costs.

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On the argument of the Appeal it was contended that every debt was a charge, by virtue of that enactment, on the lands of a deceased debtor ; and, therefore, that the Statute of Limitations was in this case no bar ; that, after judgment against the executor, the heir became a trustee for payment of the debt out of the lands descended to him ; that the heir might probably dispute the existence of the debt ; but that a judgment against the executor, as the party primarily liable, was *prima facie* evidence of such debt ; and that, supposing the Statute of Limitations to be applicable, yet an acknowledgment by the executor was, for the reason just given, sufficient to keep the debt alive ; and that indeed, according to *Thompson v. Grant* (2), and the declaratory enactment in the 9 Geo. IV, c. 33, as to India, land might be taken for debt in his hands, although in this case the heir had been made a party. It was submitted, however, that the plaintiff might come into Equity, as against the heir, for discovery of assets, and to get his title deeds ; for which was cited *Langley v. Brown* (3).

The other cases and authorities cited on either side were the following : *Evans v. Brown* (4), *Downs v. Morris* (5), *Freeman v. Fairlie* (6), *Putnam v. Bates* (7), *Hunting v. Sheldrake* (8), *Loomes v. Stotherd* (9), *Soames v. Robinson* (10) ; Ram on Assets, 303 ; and the Deceased Debtor's Liability Act, 1 Will. IV, c. 47. (*Call* 459), sections 3, 4, and 9.

(2) 1 Russ. 540. (3) 2 Atk. 198. (4) 5 Beav. 114. (5) 3 Hare 399. (6) 2 Meriv. 24. (7) 3 Russ. 188. (8) 9 M. and W. 256. (9) 1 Sim. and Stu. 461. (10) Myl. and K. 500.

1850. We are of opinion, that, on two short grounds, the decree in this cause must be affirmed. This is not a suit for the general benefit of creditors, as under the Traders Act of 47 Geo. III, c. 74 (for which the BANK OF AUSTRALASIA v. MURRAY. 1 Will. IV, s. 4, is substituted), praying the administration of the estate ; but it is instituted by one creditor, for himself alone, claiming, as against an heir, the benefit of a judgment, to which that heir was no party ; and in respect of a cause of action, to which he would now have, if sued, a clear legal defence. It appears to us, that, for such a purpose, the plaintiff has no right to come into this Court, seeking equitable relief. If the deceased had been sued as a Trader, the remedy would have been in Equity, by the express terms of that enactment. But, under the 54 Geo. III, c. 15, whether the proceeding be properly against the heir or the executor, the remedy would seem clearly to be at law. The land, it is conceded by the suit itself, descended to the heir. Why, then, should not the heir have been sued ? The statute provides that land shall be assets, for the satisfaction of all debts, and demands, of every kind, "in like manner as real estates are, by the law of England, liable to the satisfaction of debts by bond or other speciality." In what manner is land so liable there ? It is made liable, by action at law against the heir ; or where the land has been devised, by an action against the heir and devisee. If there were no heir, the devisee would, it is true, before the statute 1 Will. IV, c. 47 (see *Hunting v. Sheldrake*) have held it without liability to the debts. But that defect in the law (whether originally the result of accident or design) has now been remedied. So, if there had been no heir, the land would have gone to the lord by escheat. Here, however, there was no devisee, and there was an heir. He might, therefore, have been sued at law ; and we can perceive no reason why he should not have been. So, if he be still liable, he is liable at law ; and the resort to a Court of Equity was unnecessary.

But, supposing that the heir could be sued in Equity, in a suit differently framed, or that the plaintiff could even succeed in this, if sustained by sufficient evidence of the debt, we think that the Decree was nevertheless right, for the reasons assigned in His Honor's judgment. The existence of the debt, independently of the executor's admission, is not established ; and we are quite clear that, as against the heir, that admission cannot operate. For the same reason, the acknowledgment can have no effect, as against the heir, to take the case out of the Statute of Limitations. If the land belonged to the executor, or if it be disposable by him for the payment of debts, his admission would no doubt be effectual ; because it would then operate against himself alone. And

that is the effect, precisely, which we attribute to his admission. It binds the party who made it; but it will not bind one who was no party to it.

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It was urged, that, as a real estate is chargeable with a deceased person's debts, and the executor is the party primarily liable, he is the proper party to make admissions. We do not feel the force of that reasoning. The property is either that of the heir, or it is the property of the executor; or it is, for the payment of debts, disposable by him. In the last of these alternatives, and still more in the second, the admission would of course be conclusive. For, though he might have an interest, in respect of his contingent claim to the residue, he would have no more right to interfere, than a legatee would, in respect of the personality. The executor would, in either case, be the party liable; and the land would be assets in his hands. But to say here that he is so liable (that is to say, in respect of any other than the personal estate), is to assume the question in debate. If the land belongs to the heir, and cannot be appropriated by the executor, or taken under process against him, we do not see how his admission can in any way affect the heir. An executor is liable to be sued on the testator's bond, or for any other speciality debt, equally with the heir. But could it be maintained that, because the executor is so liable, his admission will be evidence against the heir, in an action on any such bond? If not, why should a different rule prevail, in respect of simple contract debts to which the heir is liable?

But, on the authority of *Thompson v. Grant*, and the enactment in the 9 Geo. IV, c. 33, it was enacted that land in these colonies is disposable, for the liquidation of debts, by an executor. This is, indeed, a grave question; and, in the present case, the more important, because the executor here not only admits the debt, but he is willing that a Decree, to bind the land, should go against him. We are of opinion, however, for the following reasons, that land in this Colony is not so disposable. With respect to the 9 Geo. IV, c. 33, it is to be observed that land in India (see the judgment in *Freeman v. Fairlie*) always had been taken, and sold, under an execution against the executor. The usage appears to have been sanctioned by the Courts; and it may have been thought, that it had thereby become law. The statute, accordingly, confirms and establishes that usage. But, at the time of the passing of the said 9 Geo. IV, it was a question much debated, whether land in India was not personal estate. This fact sufficiently appears, by s. 6 of the statute: which declares, that nothing in that Act shall make land

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real property, if by law it was deemed personal. It further appears, by the judgment in *Freeman v. Fairlie*; in which case, the nature of landed estate in Bengal was the precise point in dispute.

Stephen C.J. The Act was passed in June, 1828. It recites that doubts were entertained, whether real estate in India was liable, in the hands of executors, to the payment of debts. It then declares and enacts, that real estate in India was, and should continue to be, so liable; and that the Courts may issue execution, in any action against an executor or administrator, for seizing and selling the real estate of the deceased accordingly. Nevertheless, in November, 1828, Lord *Lyndhurst* says that the statute would still leave the land, as real estate, descendible to the heir. If, then, in places where, by express provision, land may be taken for debt in an executor's hands, the land notwithstanding continues in its nature real property, it seems to us impossible to maintain that in a colony where it is undoubtedly real estate, and the enactment relied on falls short (in terms, at least) of such a provision, land goes into the hands of the executor, merely because it may be sold for debt in someone's hands, the statute not saying in whose.

The 54 Geo. III, c. 15, makes land assets, both in the debtor's lifetime, and after his decease, for the payment of his debts (and whether by speciality or by simple contract), so that it can be sold under execution, in like manner as personal estate may be. The statute does, therefore, three things, which in England, could not be done in cases of debt. It enables creditors to take the *whole*, instead of a moiety only, of the debtor's lands; it allows those lands to be sold under a writ of *Fi. Fa.*; and it subjects them, after the debtor's death, to the payment of *all* debts, instead of leaving them to satisfy debts by speciality only. Why the law should be holden to extend further, so as to have the effect of enabling a creditor to take lands, which (it is admitted) descend on the *heir*, under a judgment and execution against the executor, that is to say, out of the hands into which they have never come, it seems to us impossible to assign a sufficient reason.

Sir *Thomas Plumer*, it is true, in *Thompson v. Grant*, appears to have decided that land in the West Indies, under a statute worded precisely like the 54 Geo. III, became "with respect to the payment of debts, converted into personal assets," and liable "in all respects to be administered as such." Upon that point, however, it occurs to us that *Thompson v. Grant* is not necessarily an authority. The defendant there was personally a creditor of the deceased; he was a creditor, also, as executor of a third party; and a large sum, the proceeds of real estate of

the deceased, or rather of the rents and produce of that estate, was in his hands. He claimed to pay himself out of that money; but it was objected that he had no right to do so, unless he had the right of an executor to *retain*. Now the defendant, in fact, was executor of the deceased; but he had received those proceeds, in the character of consignee, an appointment conferred on him by the Court. The suit was instituted on behalf of the creditors generally, and the title of the heir, as distinguished from that of the executor, to the rents and produce, was not in question. Neither could it have interposed, for the defendant was devisee, as well as executor. Under these circumstances, the land being clearly liable to his debt, he may have been entitled to retain. But, with respect to the dictum that land, for the satisfaction of debts, becomes personal estate, we cannot assent to it; and the difficulties in which such a decision, in these colonies, would place titles to land, and the rights of heirs, are too obvious to need enumeration.

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The enactment requires no such decision. There is little difficulty in suing an heir, and as little, where there is a will, especially since the 1 Will. IV, c. 47, in suing the heirs or devisees. And if, in any case arising before that statute, there is not an heir, we see no more reason why an escheat should have been defeated, in favour of a simple contract debt, than in respect of a debt by specialty. Had the Legislature intended to make land personal assets, it most probably would have so enacted. There would then have been no room for argument. But how an heir, on whom his ancestor's land has descended, could defend his interests against a creditor, in such a state of the law, or compel an executor to pay debts out of the personalty, we do not at all understand. Nominally, the land would be his, but practically, it would be under the control of the executor, who, by admitting a debt twelve or fifteen years old, as in this case, might surrender the heir's property, without defence, or the right of being heard, to be summarily taken in execution.

I am to add, for Mr. Justice *Dickinson*, that the established course of this Court, to follow English decisions, might have induced him to adopt that of Sir *Thomas Plumer*, in *Thompson v. Grant*, without examination, but for the observations and opinion of Lord *Lyndhurst* in *Freeman v. Fairlie*, the effect of which, His Honor conceives, materially impairs the authority of *Thompson v. Grant*, as to the nature of real estate, when sought to be applied to the satisfaction of debts.

All circumstances being considered, we regret, in confirming the Decree, we are compelled to give costs, but the rule appears to us to be imperative.

Appeal dismissed.

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MARTIN v. NICHOLSON. (1)

Sept. 27.

Stephen C.J.
Dickinson J.
and
Therry J.

Legislative Council—Elections—Constitution and Electoral Acts—5 & 6 Vic., c. 76, ss. 2, 8, 9, & 11; 6 Vic., No. 16, ss. 36, 46, 47, & 48—Jurisdiction of Supreme Court in cases of disputed elections—Evidence.

In an action for trespass, against the Speaker and Sergeant-at-Arms of the Legislative Council, for ejectment of the plaintiff from the Council Chamber, *held*, that although the question of membership was unavoidably in issue, if the law had specifically provided a tribunal for the determination of that fact, the decision by that tribunal was the only admissible evidence of it; but that, if the Governor and Council, by whom the question of the vacancy had been actually decided, had not power to do so, no evidence was admissible to impeach the plaintiff's right, for in any case the Court had not the power to entertain the question.

A jurisdiction given to one tribunal is ordinarily to be taken as excluding that of any other.

Where the Electoral Court, established under the authority of 5 & 6 Vic., c. 76, s. 2, has jurisdiction, as it has in respect of disputed returns, the vacancy of a seat is to be determined by that tribunal, and not by the Governor under s. 11.

THE facts in this case appear in the judgment of the *Chief Justice*. It was argued on July 16 and 17, and the reserved judgment of the Court delivered by their Honors severally on Sept. 27. The plaintiff appeared in person, and *Foster* (*Fisher* with him) for the defendants.

THE CHIEF JUSTICE. This was an action of trespass, against the Speaker and Sergeant-at-Arms of the Legislative Council, for assaulting the plaintiff, he being then an elected member of that body, and removing him from the Council Chamber, and preventing him from attending the meeting of the said Council. The defendants pleaded in justification, that at the time mentioned the plaintiff was not a member of the Legislative Council, but a stranger then being in the said Chamber without the permission of the Council, and seated in the place exclusively appropriated to members; for which cause the first-mentioned defendant, as Speaker of the said Council, in pursuance of the Standing Rules of the House, directed the Sergeant-at-Arms to remove the plaintiff, and the other defendant as such Sergeant did then remove him accordingly. The plaintiff replied, that at the time when, &c., he was a member of the Council; and on this allegation issue was joined.

(1) *The Sydney Morning Herald*, July 19, October 4, 1850, cited 4 S.C.R. 20.

The cause came on for trial before me, at the Sittings in March last ; when it appeared, that the ejection complained of was consequent on certain resolutions of the Legislative Council, terminating in a vote that the plaintiff was not duly qualified, in respect of property, and in the issue of a new writ for the election of another member in his stead. No proceedings, however, having been taken before the Electoral Court, established by the 6 Vic., No. 16, s. 36, the plaintiff contended that he could not be legally displaced, and that the Council had no authority in the matter. He consequently persisted in retaining his seat ; and his removal was effected accordingly, in the manner stated in the pleadings. The plaintiff rested his case at the trial on the same position. He denied the authority of any tribunal, other than the said Electoral Court, to entertain a question as to the due return of a member, whether his right to sit was impeached on the ground of his election being void or not ; and whether the Council had resolved, or not, that it *was* void. He, therefore, at the outset of his case before me, submitted that no evidence could be received, as to his want of the required property qualification ; and offered, in case I should think otherwise, at once to admit that he had not that qualification. The defendants, on the other hand, maintained that I was bound to receive such evidence ; that, if no other tribunal had, yet the *Legislative Council* at all events had power, to entertain the question of membership ; and that, as that body had entertained and adjudicated on the question, and decided that the plaintiff had no qualification, and by reason thereof was not a member, the facts could not be excluded from consideration, by this or any other Court.

I said, that I did not see how I could refuse the proposed evidence, as to the fact of membership, or of qualification, as involved in it, inasmuch as both parties had raised that issue on the record of the trial ; but that, as it appeared to me, the adjudication on those facts by the Council, however material in one respect, was not a judicial act, and therefore was neither conclusive of it, nor, as I conceived, evidence on the question. I consented, however, to receive all their proceedings ; in a view to the ultimate decision of the whole case, by the Court. It was then agreed by both parties, in effect, that every fact on either side should be admitted ; that the several proceedings and votes of the Legislative Council should be received, subject to objection to their admissibility, as on a trial ; and a verdict for forty shillings was taken, with a special finding of several facts, subject to the opinion of the Court, whether, on the facts and finding, subject to objection as aforesaid, the plaintiff is entitled to recover.

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The facts thus by consent found, or admitted, or which appear on the face of the documents put in, are the following:—That the plaintiff, under a Writ duly issued, was returned as a member of the Council, and took his seat as such, and, having made the declaration of qualification required by law, voted as such Member on several occasions. That afterwards a petition was presented to the Council by certain Electors of the District for which he was returned, representing that the plaintiff was not qualified; and that that Petition was referred by the House to a Select Committee, by whom evidence was taken (that is, by statements not on oath), and a report made in substance, that the plaintiff was not qualified. That thereafter the Council addressed the Governor, transmitting a copy of the Report, and requesting his Excellency to take such steps, as in his opinion were required in the matter. That the Governor, thereupon, by advice of the Law Officers, referred to the Council the question for their decision, whether the plaintiff's election was void; and that the Council resolved, in reply, that it was void. That thereupon the Governor, being satisfied (as his Excellency announced to the House) that the seat which Mr. *Martin* was elected to fill, was still vacant, issued a Writ for a new election; and that the plaintiff was not ejected, until after those several proceedings, and after notice to him thereof. That in fact, the plaintiff was not qualified; but that no proceedings were ever taken, in relation thereto, or to his return, before the Electoral Court; nor was there, at any time, any Petition to the Governor, on which any such proceeding could, by law, have been founded.

These, then, are the matters of fact; and the following are the enactments, in connection with which they are to be considered: The present Legislative Council owes its existence, to what is commonly termed the Constitutional Act, of 5 and 6 Vic., c. 76, by which, it is to be composed of thirty-six members, twenty-four elected by the Colonists, and twelve appointed by Her Majesty. By s. 2 of the Act, the then Colonial Legislature is empowered to make all necessary provisions, for dividing the Colony into Electoral Districts, and appointing the number of members for each, and compiling lists of voters, and for issuing, executing, and returning the Writs for the Elections, and taking the Poll thereat, "and for determining the validity of all disputed Returns," and otherwise ensuring the orderly and impartial conduct of such elections. By s. 8, no person "shall be capable of being elected" a Member of the Legislative Council, who shall not be of full age, and a natural-born subject, or naturalised, or not legally or equitably seized of an estate of freehold of the yearly value of £100, or of the value of £2,000, above all incumbrances. And by s. 9, before a candidate shall be capable of election,

he shall, if required, make a declaration that he is so seized, and that he has not collusively, or colourably, obtained the lands, for the purpose of qualifying. Then comes the provisions, on which (mainly, if not exclusively) the course taken by the Governor, and the Council, in this case, appears to have been founded. By s. 11, "whenever it shall be established to the satisfaction of the Governor, that the seat of any elected Member has become vacant, the Governor (unless other provision be made in that behalf by the Governor and Legislative Council, as herein-before provided) shall forthwith issue a Writ, for the election of a member to serve in the place so vacated, during the remainder of the term of the continuance of the Council." By s. 15, any Member of the Council, by writing under his hand, may resign his seat, and, upon such resignation, the seat shall become vacant. By s. 16, if any member shall absent himself for two Sessions, or take any oath or declaration of allegiance to any Foreign State, or become Insolvent, or *non compos mentis*, or be convicted of any infamous crime, his seat shall become vacant. By s. 17, if any appointed Member, designated as the holder of a Public Office, shall cease to hold such Office his seat shall become vacant. Then, by s. 18, "any question which shall arise respecting any vacancy in the Council, on occasion of any of the matters aforesaid, shall be heard and determined by the said Council, on such question being referred to them for that purpose by the Governor, and otherwise."

In pursuance of the Constitutional Act, an Act was passed by the late Legislative Council, being the 6 Vic., No. 16, commonly called the "Electoral Act," by the 36th section of which provision is made for the creation of a Court "for the trial of any complaints which may be made by the Returning Officers of the several Electoral Districts." By s. 41, that Court is to "have power to enquire into all cases, which may be brought before it by the Governor, respecting Disputed Returns of Members to serve in the Council; whether such disputes arise out of an alleged error in the Return of the Officer, or out of any allegation of Bribery or Corruption, against any person concerned in the election, or out of any other allegation calculated to affect the validity of the Return." By s. 46, all complaints of the undue Return of Members shall be addressed in the form of a petition to the Governor, which must be from a Candidate or a number of Voters, not less than one-tenth of the whole number on the list, and must be presented within twenty-one days, or, in certain Districts, within thirty-six days after the day of election. All such Petitions, by s. 47, are to be referred by the Governor to the Court. Lastly, by s. 48, the Court in hearing and deciding on such Petitions, is to "Receive or reject, at their discretion, any evidence

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1850. that may be tendered to them, and shall have power to compel the attendance of witnesses, and to examine them on oath ;" and if the Court shall declare that any person was not duly elected who was returned as elected, the person declared not duly elected shall cease to be a member ; and if the Court shall declare any person to have been elected, who was not returned, the person so declared shall be sworn a Member, and take his seat accordingly ; and if the Court (erroneously written *Council*) shall " Declare any election to have been absolutely void, it shall be lawful for the Governor, on the same being certified to him by the President of the Court, to issue a new writ for the holding of another election."

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By an Act of Parliament subsequently passed 6 and 7 Vic, c. 74, s. 2, the Declaration as to Qualification, which (as we have seen) was required to be taken before the election, when required, is dispensed with in respect of absent Candidates ; and by s. 3 every elected Member is required to make the said Declaration, by delivering the same in writing, with particulars of the property, to the Clerk of the House, before he shall vote or sit therein. And if he shall not be qualified, according to the true intent and meaning of the enactment in that behalf, " his election shall be void, and a new Writ be issued to elect another member in its stead."

The state of the Term paper in April last prevented the coming on of this case for argument, before the 16th July, when it was very fully discussed, and we took time to consider of our judgment. It is not my intention to recapitulate the arguments, for they have been already very well reported elsewhere. I shall merely mention the authorities cited ; a reference to some of which, perhaps, may be useful on a future occasion. *Bac. Ab. Parliament*, B. *ibid. Executors*, E.I. The Statutes of 9 Anne, c. 5 ; and 33 Geo. II, c. 20 ; also 10 Geo. III, c. 16 ; *Ranson v. Dundas* (2) ; the 2nd *Inst.* 468, 478. Several cases of Election Petitions, from *Chamber's Law of Elections*, and the Reports of *Cockburn and Rows*, *Knapp and Ombler*, and others. *The Queen v. Corporation of Pembroke* (3) ; *Mr. Southey's case* (4) ; *The King v. the Mayor of Cambridge* (5) ; *Bruyeres v Halcomb* (6) ; also *Kielley v. Carson* (7). It is necessary only to add that we took the earliest opportunity, after the intervention of the Circuits and Sydney Sittings, of conferring together on the case ; and that, although not without hesitation on my part as to one of the points in it, the following is the result.

(2) 3 Bing. N.C. 149. (3) 4 Jur. Q.B. 317. (4) May's House of Commons 340. (5) 4 Burr. 2008. (6) 3 A. & E. 381. (7) 4 Moore P.C. 63.

We are all clearly agreed, in the first place, that the mere issue of the second Writ, although before the ejection of the plaintiff, cannot affect the question of his membership, if that act was itself in point of law unauthorised. The new Writ, at whose instance soever issued, was founded on the declaration of a vacancy in the seat lately before filled by the plaintiff; and if no such vacancy existed, it is clear that the Writ itself could not operate to make one. On the other hand, we conceive it to be equally clear that in every case in which the Governor may, either alone or in conjunction with the Council, determine the fact of a vacancy in any seat, such a declaration is authoritative and judicial; so that the fact of such vacancy cannot afterwards or elsewhere be controverted. If, however, neither he nor they had power to determine that question, then we think that the Writ failed to operate for the want of such a power.

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It occurred to me at the trial that the question of vacancy (or, in other words, of membership) was unavoidably in contest, because such was the precise issue, in terms which the parties came prepared to try. But it did not follow that any direct evidence of the fact, or of circumstances tending to establish the fact, was therefore admissible as in an ordinary case. If the law has specifically provided a Tribunal, for instance, for the determination of the fact, the decision by that Tribunal would be the only evidence of it. And if the Council, or the Governor acting in conjunction with them, had power to determine the question, his or their decision would alone constitute the evidence. If any other could be received, a different conclusion might be arrived at on the question; and results the most embarrassing would ensue. It seems but reasonable, therefore, as it is certainly in accordance with the rules of law, to hold that the declaration in the Writ, in this case, or the determination by the Council, on the reference to them by the Governor, if they had the power assumed, was conclusive; and the issue raised on the record, therefore, could only have been found one way.

Supposing, however, that the Governor and Council had *not* that power, would not evidence on the question of vacancy, irrespective of any such declaration or decision, then be receivable? The argument for the defendants on this point, and for the admission of evidence to show the want of qualification, as establishing the vacancy, was substantially as follows:—The statute says that, if the party be not qualified, his election shall be void; or (which comes to the same thing), according to the previous enactment, he shall be incapable of being elected. The want of qualification avoids the election from the commencement. It

1850. is as if there had been no election. But if there was no election, the
 MARTIN plaintiff was no member ; and his complaint, therefore, is at an end.
 v. The plaintiff's position, on the other hand, is this : I was, in fact,
 NICHOLSON. returned as a member ; I took my seat ; I voted. Here, then, is the
 Stephen C.J. legal evidence, and the only evidence of membership ; and the law does
 not permit that title to be defeated by any investigation in this Court,
 because it has provided the means of determining the question elsewhere.
 Those means have not been resorted to ; and there is now, therefore, no
 admissible evidence to impeach my right.

I agree with the other members of the Court, that, for the reasons thus submitted, no evidence of the want of qualification was, in this case, receivable. We have already said, that, if the Governor and Council had power to entertain that question, their decision on it must (to avoid conflict of jurisdictions) be regarded as conclusive. Whether they had that power we shall consider hereafter. But we think that, at all events, this Court has not the power. The argument, that, as the question was raised on the record, I was bound to try it, has been already disposed of. And, whatever force may have been in that argument at the trial, the course eventually taken has destroyed it, for the validity of the plea, as a defence, is now as substantially before us as if the point had been taken by demurrer, or the plaintiff had replied specially, by way of *estoppel*. Now the plea alleges, that, at the time of the removal complained of, the plaintiff was not a member of the House, but a stranger. The question is, can evidence establishing this want of qualification be received in a court of law (irrespective of any previous authoritative declaration, by the House or any other tribunal) to show that his election was void, and so, that he was no member. If such evidence were receivable, let us for a moment see what would follow. Every *de facto* member of the Council, however long he may have occupied his seat, would be liable to challenge, and his rights of membership to impeachment, at the will and pleasure of any person at any time. Similar evidence would equally be admissible, of course, to establish the fact of alienage, or infancy. No sitting member, under such a state of things, could ever feel secure against annoyance. But, suppose the question of membership to have thus been raised and decided against the *de facto* member, by the verdict of a jury. What then ? Will the decision deprive him of his seat ? Will it be conclusive, either on the Council or the Governor ? If not, to what an absurdity is the question reduced ? Such are a few of the embarrassments to which the admission of the proposed evidence would conduct us.

The solution of the difficulty is, that the evidence cannot be received, because other means of trying the question of membership are provided ; that is to say, if not by intervention of the Council, or the Governor, yet in and by the Electoral Court. By the Constitutional Act, if a candidate be not qualified, he *cannot be elected* ; or, in the language of the subsequent statute, his election will be *void*. The plaintiff, therefore, if not qualified, was not duly returned as a member. Such, in fact, was the very argument of the defendants. The plaintiff, they urged, was never truly a member ; for by express provision he could not become one. But, if so (and we think that it clearly is so), what was this case but one of an invalid and wrong return ? In perfect strictness of language, perhaps, it may be said that still it was not a "*disputed*" return. Substantially, however, and within the true intent and reasonable construction of the Act, any objection to the return of a member, on the ground of nonqualification, must be taken to make the return a disputed one. It is little to the purpose to say, that, in fact, there was no dispute at the time. There may or there may not have been ; we have nothing before us on the point, and we think the inquiry wholly immaterial. It is sufficient, if the Electoral Court could have taken cognizance of such a dispute, had one existed, and a complaint against the return, by reason of the premises, have been duly referred to them, and as to this, we have none of us a shadow of doubt.

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The Court is constituted (Electoral Act, 6 Vic., No. 16, ss. 40 and 41) to try "complaints against the validity of returns"; and it has power to inquire into all cases "respecting disputed returns," whether the dispute arises out of error, bribery, or "any other allegation calculated to affect the validity" of the return. Had a petition, then, been duly presented, from the proper parties, against the plaintiff's return in this case, there can be no question, we think, as to the power of that Court to have entertained and adjudicated on the matter. And, if it be thought worth while to object, that no such petition was presented, the answer seems to us to be decisive, that, not improbably, in such cases as the Legislature has made no provision for them, no remedy was intended to be provided. Mr. *Grenville's* Act, 10 Geo. III, c. 16, confers powers similar to those of the Electoral Court, on Committees of the House of Commons ; who are to try all Petitions "complaining of undue elections or returns." Now, the Election Cases cited abundantly prove that such Committees try all questions of Qualification. Yet, by 33 Geo. II, c. 20, the election of an unqualified person, equally in England as in this colony, is *void*. If, therefore, no formal avoidance of the seat were necessary by

1850. the decision of that Tribunal, we should assuredly have found some case in which the want of qualification had been insisted on in a Court of law. But no such case, we venture to say, can be produced.

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Stephen C.J. The question is not—it will be observed—was the plaintiff qualified, but was his seat vacant? And if we cannot legally, and as a matter of right, investigate and decide the latter question, the plaintiff's admission, for the purposes of the cause, that he was not qualified, will not avail to give us the power. It is obvious that neither proof nor admission, in this Court, of a cause of vacancy, which vacancy we cannot judicially declare, could establish that there was such a vacancy.

That, notwithstanding the use of the term *void*, or the words capable of being elected, in the Constitution Act, some judicial declaration was thought necessary, to defeat an election and return, may be gathered from the Electoral Act, s. 48, which speaks of cases, where the Court shall declare a person not duly elected, and cases where it shall declare any election to have been *void*. On the authority of the cases cited, from 4 *Burr*, and the *Jurist* (8), it must be conceded that a *void* election will, in general, be regarded as no election. But that principle does not hold in any case where the law has provided means, as here, for ascertaining and declaring the nullity. And the well-known principle then applies, that a jurisdiction given to one Tribunal, is ordinarily to be taken as excluding that of any other.

We come, then, to the only remaining question, namely, whether the plaintiff's seat was legally declared vacant, because of his non-qualification by the Governor and Legislative Council. In other words, whether that Body or the Governor, or both, had power efficaciously to declare such vacancy. If they had, there can be no further controversy; for the power, if possessed, has been duly exercised. Now the power is claimed in respect of the Governor, as given by the Constitutional Act, s. 11, and in respect of the Council, under the same Act, s. 18. The defendant's counsel claimed it, further, on what was asserted to be a general principle, arising from the alleged necessity of the case, and the reason of the thing. It would be monstrous to suppose, said they, that a Pauper or an Infant could be returned, and the Council have no authority to declare the seat vacant, merely because a wilful or careless constituency perfectly cognisant of the fact, may forget or be indifferent to their duty. To such arguments, we need only give this answer: that, however desirable the existence of such a power might be in cases of

(8) *Rex v. Cambridge*, 4 *Burr*, 2008, and *Reg. v. Pembroke*, 4 *Jur.*, Q. B. 317.

that nature, we cannot attribute it to the Council, or to the Governor, unless we find it within the four corners of the statute. The *necessity* for its existence, most certainly, cannot be established; and it is quite possible that, if we do not find the power expressly given, the Legislature may have meant it to be withheld.

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We are all of opinion that the power contended for was not given. It appears to us that the jurisdiction of the Electoral Court over disputes and complaints respecting an improper or invalid Return, is (in accordance with the principle already intimated) an exclusive one, and that, where neither an opposing candidate, nor the requisite number of electors, shall petition against such Return, it becomes thenceforward unimpeachable. The 11th section of the Act, tends strongly to confirm this opinion. By s. 2, the Colonial Legislature is empowered to "make all necessary provisions" for (among other things) determining the validity of disputed Returns. And by s. 11, whenever it shall be established to the satisfaction of the Governor, that the seat of any elected Member has become vacant, he is, *unless other provision in that behalf be made, as thereinbefore provided*, to issue a new writ. Now, there is no previous enactment to which this can be referred, except the one in s. 2 respecting disputed Returns. On this subject other provision *has* been made, that is to say, by the Electoral Act. Whence it follows, that, in cases where this latter provision applies, the enactment in s. 11 does not. In other words, where the Electoral Court established under the authority of the 2nd section, has jurisdiction, as it has in respect of disputed Returns, the vacancy of a seat is to be determined by that tribunal, and not by the Governor. But for that reference, indeed, it might well be doubted whether s. 11 contemplated any other vacancy than those arising by matters subsequent cases, that is to say, of a seat once filled, but which *becomes* vacant.

So much for section 11, and the power of the Governor. The 18th section gives a similar power of determining certain particular questions of vacancy to the Council. Those questions must relate to some vacancy (that is, alleged vacancy) arising "on occasion of any of the matters aforesaid." It clearly is not, therefore, every occasion or cause of vacancy, which can be determined by the Council under this section. Referring, then, to the three preceding sections, in which sundry such causes are enumerated, we find resignations, absence from two Sessions of the Council, becoming insolvent, ceasing to office (where appointed by reason of Office) and other *ex post facto* matters, mentioned. And hence it appears to us, to be the true and only reasonable construction of the enactment,

1850. that these alone were the matters which it contemplated. The question, therefore, of a vacancy by reason of non-qualification, the same not being one of those matters, was one which the Governor had no authority to refer to the Council, and on which they had not the power, by virtue of such reference or otherwise of adjudicating.

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Our opinion being thus with the plaintiff, on all the points submitted to us, he will retain his verdict, and have judgment thereon.

DICKINSON, J. As my learned Colleagues consider that it is desirable that each member of the Bench should deliver his own views on this occasion, I have only to say that I have had the advantage of perusing the judgment which their Honors have drawn up since our last consultation upon this case, and that, agreeing with each of them in substance, and being unable to improve the form in which they have propounded their opinions in their respective comprehensive judgments, I propose merely to offer a few remarks upon that which I conceive to be the most striking part of the matter in dispute before us.

Assuming the plaintiff at the time of the election not to have been qualified, yet I think the Returning Officer was bound (even if the plaintiff's disability had been pointed out to him) to receive all the votes tendered for him, and to have left the party objecting to petition. See *Watson on Sheriff*, p. 310, and cases cited in note (3). As therefore the plaintiff had the greater number of votes, it was the Returning Officer's duty to return the plaintiff, i.e., to notify to the Council, that the plaintiff had been chosen by the electors as their representative. But as the plaintiff was not a proper person for them to elect, the propriety of their choice might of course be disputed, and as the only evidence of that choice was the officer's *return*, the objection to the plaintiff's capacity would have been resolved into a question of a disputed return. This conclusion seems to me completely borne out by the election cases cited during the argument.

As, then, before the election of the plaintiff, a Court was established for determining the validity of all disputed returns, and therefore a provision (respecting a vacancy occasioned by absence of qualification) was made other than the issuing of a new Writ, upon the satisfaction of the Governor that a vacancy existed, I think that the 11th section of the Statute had no application to the circumstances of the present case. I am also of opinion that the 18th section of that Statute was irrelevant to this matter. For, though it is thereby enacted, that any question respecting a vacancy "on occasion of any of the matters aforesaid" shall

be determined by the Legislative Council, if referred to them, I think that that section must be confined to the cases of vacancy mentioned in the sections after the eleventh, as a material provision of the latter would otherwise be repealed by the 18th section, and the provision giving the powers already mentioned to the Electoral Court be inoperative.

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Now as, by the 2nd section of the Constitutional Act, the then local legislature was empowered to make ordinances *for determining the validity of all disputed returns*, and as, by their enactment in that behalf, they constituted a Court, for the trial of complaints against the validity of returns, and prescribed the manner in which such complaints should be prosecuted, it appears to me that the plaintiff could only cease to be a member of the Council, upon the declaration of that Court that he had not been duly elected. For the dispute about the plaintiff's eligibility was (as we have seen) a question of disputed return, over which that Court had jurisdiction.

I conceive it to be an acknowledged principle, that, when the law has appointed a method of avoiding an act, that act is only voidable, and not void *ab initio*; and therefore the plaintiff's election was only voidable, though "*in respect of the defeasableness of it*" by section 48 of the Electoral Act, the Election may (by reason of the 8th section of the Constitutional Act) be considered "*as good as void.*" *Bac. Ab. Void and Voidable*, B.C. The plaintiff is in my opinion clearly entitled to the judgment of the Court, for, when he was ejected from the Council, he was a member of it, as his election had not been voided by judgment of the Electoral Court.

TERRY, J. Concurring as I do in the general views exhibited in the judgments of the *Chief Justice* and Mr. Justice *Dickinson*, yet, in a case of such importance, I deem it right to state the opinion impressed individually on my own mind as to one or two of the more prominent points.

It appears to me that the present question is rightly dealt with, by reference to the Constitutional and Electoral Acts alone. These are the exclusive tests by which it is to be decided, and it is quite unnecessary to encumber the case by any reference to the privileges and usages of the Parliament of England, or with arguments of analogy derived from them. Many of the ancient privileges and usages of Parliament are, like absolute powers, out of the ordinary line and course of our law and government. Such I conceive to be the power of expulsion, and the judicative power of our two Houses. But it cannot be contended that such powers are incident to the Legislative body of this colony. It is

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itself a creature of the Parliament of England, and is invested with such jurisdiction alone as is conferred upon it by the Act that created it. The Legislative Council possesses the power, and, I apprehend, only the power, like the rest of the Queen's subjects, of doing what the law allows, *potestas faciendi quicquid per leges licet*. And the only question to be determined is, whether under the law by which that body is constituted, or any local law or ordinance, the present plaintiff could be deprived of his seat in the manner in which, in the present instance, his seat has been pronounced to be vacant?

The construction of the Act respecting vacancies occurring under the 15th, 16th, and 17th sections, is a point so fully gone into by the *Chief Justice*, that I will not enfeeble, by a repetition, what he has said upon the subject. I should wish, however, to address some observations upon the causes whereby vacancies may be created under the 8th section. The causes, by which in that section the seat of an elective member may become vacant, are disqualifications that render a person altogether incapable of being elected a member; in other words his election is void. But whether, in any case, an election be so or not, is a question of fact for the determination of which it behoves us to see whether any and what Legislative provision is made. By the 2nd section of the Constitutional Act, the Local Legislature may, among other things, make an ordinance for "determining the validity of disputed returns," and by the passing of the Electoral Act, agreeably to the provision mentioned in the 11th section of the Constitutional Act, an ordinance was made for that purpose. It was urged, however, that the present case could not be brought within this Act, as it was not a case of disputed return, since neither a candidate nor a sufficient number of the constituency presented a petition to dispute it. But, the numerous cases cited by the plaintiff, in which the election of a member is declared void by reason of an insufficient property qualification, prove that such objections are regarded and dealt with as the subject matter of, or, as questions in the nature of a disputed return. In the present instance, though neither the constituency nor the opposing candidate disputed the validity of the return, the Council itself proceeded to dispute it, and decide upon its validity, on the presentation of an informal petition—insufficient for the purpose of any legal investigation—and by a mode of adjudication for which no sanction can be found in the enactments of either the Constitutional or Electoral Acts. Either then it was a disputed return, or it was not so. If it were a disputed return, the proper steps were not taken to obtain an adjudication on its validity. If it were not a disputed return, what then was it? Was it an undue

election? Even so, I discover nothing in the Constitutional or Electoral Acts to sanction such a procedure as that by which the plaintiff's seat had been declared to become vacant. The mere return itself, indeed, is nothing more than a declaration made by the Returning Officer, or information furnished that a certain person was duly elected, that is, that he had a majority of votes. The return is, as it were, but a consequence of the election as is plainly indicated by the language of the 48th section of the Electoral Act, which enacts that "if the Court shall declare that any person was not duly elected who was returned by the Returning Officer, that person shall cease to be a member;" but, there is nothing in that or any other act that says he shall cease to be a member by any other mode of trial or by the sentence of any other Court than in the mode, and by the Court which the Act constitutes for the purpose. It would appear then that such a case as the present has been omitted to be provided for, and for such omission a Court of law cannot supply a remedy.

The official return by the Returning Officer may be indisputably correct, but that does not exclude the consideration of any allegation calculated to affect its validity. Whether a party be of age or not, or whether he be qualified or not, as to property or otherwise, as required by the 8th section, is a matter for judicial investigation. It cannot be decided hastily, as it were, on view. But if a tribunal be appointed to determine it, to that tribunal the question must be submitted. The election, though declared to be void, is not absolutely void, but voidable "because the law has appointed an act to be done to avoid it." (See *Bacon's Abridgment*, title, "*Void and Voidable*," marginal note, vol. 8, p. 176). The act to be done in such a case is the putting in operation the machinery by which the tribunal is created, competent to decide whether or not the election is void. From a non-observance of the preliminary steps requisite for its construction, the objects for which it was designed may be defeated. The machinery may not be judiciously adapted for the purpose of providing for all the exigencies which it was intended to meet. Yet, if it be the tribunal, and the only one under the Act, appointed to determine such a question, no assuming authority in any other quarter is competent to decide it.

Here, then, is a tribunal appointment to decide the question now at issue, whether plaintiff was a member or no member?—and I cannot discover that in either or both of the branches of the Legislature such a power is lodged. It may be very convenient and proper, no doubt, that in the event of a sufficient number of the constituency not complaining

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1850. of the return of a disqualified member, the Council, or the Governor in conjunction with the Council, should take the matter up and—
 MARTIN v. NICHOLSON. *proprio motu*,—get rid of a disqualified member by declaring his seat to be vacant. Suffice it to say, however, the present law does not confer that power on either the Governor or the Council, or on both conjointly. It throws the privilege and duty of complaint upon the constituency, or on a candidate at the election, and if the constituency or candidate fail in the exercise of that privilege and duty in the manner prescribed by law, there is no provision in the Act for the delegation, substitution, or assumption of it.

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The material questions for us to consider and decide are whether, in the absence of such a power or provision by legal enactment, extending the jurisdiction over allegations affecting the validity of a return beyond the Court to which the Act restricts it, it is legally competent for any other party to exercise it? And (what still more immediately concerns us) is it competent or becoming in this Court to insert, as it were, a new section into the Statute Book, and declare that the Governor and Council possesses a power to deal with a question which we see is entrusted to the Electoral Court?

To the proposition then, that it is desirable and expedient that the Legislative Council and Governor should possess a concurrent jurisdiction with the Electoral Court in such cases as the present, I can only say that the Statute does not contain any such enactment. It is a *casus omissus*, and that case can only be provided for by fresh legislation, by colonial legislation, if its powers are sufficiently comprehensive to attain the object, if not, by the intervention of the Imperial Legislature. Thus we find in *Comyn's Digest, of Parliament*, R. 13, citing *Jones v. Smart* (9), a *casus omissus* can in no case be supplied by a court of law, for that would be to make laws. And again, "If the words of the Statute do not extend to a mischief which rarely happens, they shall not be extended by an equitable construction to that mischief, but the case is to be considered as a *casus omissus*, for the objects of statutes are mischiefs "*quæ frequentius accidunt*," *Bacon Ab.*, (vol. 7, page 461.) *Tit. Stat.*, J. 6, citing *Bole v. Horton* (10).

The 7th and 8th Vic., c. 74, enacts that if a sitting member be not qualified according to the true intent and meaning of the Constitutional Act, his election shall be void, so that the person elected shall cease to be a member. For that purpose we are obliged to refer back to the

Electoral Act, which appoints the tribunal for the determination of the fact of qualification or not, on complaint or petition made, as is by that Act required.

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On reviewing all the circumstances of the case, and the law in reference to them, it will be found that they establish the following positions :—

1st. That before a new writ shall issue for the election of a member to serve in a vacated place, it shall be established to the satisfaction of the Governor, that the seat of the member hath become vacant. 2nd. But that this does not apply to cases in which other provision has been made in that behalf; and that such other provision has been so made by the Electoral Act, whereby the mere satisfaction of the Governor in cases of disqualification arising under the 8th section, ceases to be the test, to determine whether or not the seat of an elective member hath become vacant. 3rd. That with reference to the class of cases coming under that action, which specifies the disqualifications which render a person incapable of being elected, the mode of determining whether the seat of any such member hath become vacant is by having the case brought before the Electoral Court by the Governor, under the provisions of the Electoral Act, that Court being the only statutory tribunal for the purpose. On that Court declaring the election to have been void, and on the same being *certified to him by the President of the Court*, the Governor may issue a writ for a new election.

As the President's Certificate, then, is the test for determining, in such cases, that the seat of an elective member hath become vacant, such certificate would have been the only legally admissible evidence, under the issue at this trial, to determine that the plaintiff was not, or had ceased to be a member.

Since then the Council, either alone or conjointly with the Governor, can merely exercise powers conferred upon them respectively by the law, and since the power exercised in this instance in determining the seat to be vacant is not so conferred, the act of ejecting the plaintiff after his return, when he was *de facto* a member, and before there was any adjudication by the tribunal alone appointed to determine that he was *de jure* not so, by reason of his election being void, was an act not done under the sanction of legally qualified authority, and therefore judgment on this record must be entered for the plaintiff.

Verdict entered for the plaintiff.

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HANNAN v. COOPER AND ANOTHER. (1)

Oct. 2.

Stephen C.J.
Dickinson J.
and
Therry J.

Trespass, quare clausum fregit—Right of way—Evidence—Plan—Pleading—New assignment—Reply de injuriâ—Averments in aggravation.

The declaration was in trespass, that the defendants broke and entered the plaintiff's close, trod down the grass, and prostrated the fences thereof, &c., and referred to a plan annexed, in which the close in question was coloured pink, and divided into two parts by a space coloured brown, described as a highway. The defendants pleaded the General Issue, and as to the breaking and entering the close and prostrating the fences, that they entered because there was a highway over the close, and prostrated the fences because they obstructed that way. To the latter plea the plaintiff replied *de injuriâ*.

Held, the defendants might have pleaded merely to the breaking and entering the close, considering the other averments as but matters of aggravation, in which case the plaintiff must have new assigned; but having treated the enumeration of trespasses as substantive, the defendants were bound to show a justification coextensive, and to prove that the alleged way was obstructed by the fences broken by them.

The replication *de injuriâ* raised two issues, viz. :—The existence of the causes mentioned in the second plea.

If the plaintiff had, by two replications, split the second plea, and so traversed the way in one replication, and the obstruction of the way by the fences in the other, then the defendants ought to have succeeded, on the first, according to *Webber v. Sparkes* (2), because he proved a way, and excused his entry thereby, while the plaintiff did not new assign; on the second the verdict should have been for the plaintiff, according to *Bond v. Downton* (3), for it was found, practically, by the jury, that there was no way where the fences were prostrated, and the replication *de injuriâ*, being a substantial denial of the matters in the second plea, did not make the proof of those matters different to what would have been required by a traverse in terms in separate replications.

Although, following the direction of the judge, the jury had found on both issues for the plaintiff, the verdict, for 20s., should not under the circumstances be disturbed.

The existence of a way was proved by the plan.

THIS case was argued before the full Court, July 23, and the reserved judgment delivered, October 2, by—

DICKINSON, J. This was a motion for a new trial on the ground of misdirection by myself on the trial, which took place in June last.

The misdirection complained of was, that I erroneously informed the jury of the issue they were sworn to try.

(1) *The Sydney Morning Herald*, July 24, October 10, 1850.

(2) 10 M. and W. 485.

(3) 2 A. & E. 26.

The action was trespass—*qu. cl. fr.* In the declaration the plaintiff complained “that the defendants *broke and entered his close*”; broke open and spoiled certain gates and fences, and the locks, staples, and hinges of those gates; trod down the corn and grass in the said close; and *prostrated portions of the fences standing thereon*. The declaration (according to a rule of this Court) instead of giving the close a name or stating its abuttals, described it by reference to a coloured plan annexed, on which were marked *two spaces coloured pink, divided by a narrow space coloured brown*. By inspection of the plan, the two spaces coloured pink and that coloured brown appeared to be portions of the same piece of land. On the plan it is stated “that it is the one referred to by the declaration, and that the part coloured pink comprises the *locus in quo*.” On the plan the space coloured brown is described as a portion of the highway from Sydney to Illawarra.

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The defendants pleaded first the General Issue. Secondly, *as to the breaking and entering the close, and prostrating the fences*, that they entered the close because there was a highway over it, and that they prostrated the fences, because they were obstructing that way.

The plaintiff to the latter plea replied, *de injuriâ*, to which the defendant rejoined by the common similitur.

At the trial there was abundant evidence that the defendants on several occasions claimed a right across the close, and that on a day before the action was brought, they broke down several yards of the plaintiff's fencing. There was evidence that there was, at some distance from the spot where the fencing was broken by the defendants, such a highway as was represented on the plan by the brown coloured space but that it was separated by fences on either side from the two spaces coloured pink, so that the latter formed two distinct enclosures, and the way between was not only not obstructed, but was rather indicated by those fences. The struggle was to prove that the part of the fence which was broken stood on and was obstructing *another* highway over the plaintiff's close.

After referring the Counsel to *Taylor v. Cole* (4), and *Phillips v. Howgate* (5), and mentioning to them that I felt embarrassed by the replication *de injuriâ*, I told the jury to find for the plaintiff on the first issue; and also to deliver their verdict for the same party on the second issue, unless they were of opinion that the defendants had proved a

(4) 3 T. R. 292.

(5) B. & Ald. 220.

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highway over the close, and that the part of the fence they knocked down was standing on and obstructing the same way. The jury delivered a verdict on both issues for the plaintiff, with 20s. damages.

On account of this direction, the defendants during last term applied for a new trial. Mr. *Foster* and Mr. *Darvall* argued in support of the motion, the *Solicitor-General* and Mr. *Broadhurst* supported the verdict.

On argument, the learned Counsel for the defendants contended that the plaintiff, by his declaration, had merely complained that the defendants entered his close, and had trod down *some* grass and had broken *some* fencing thereon. That the injuries to the grass and fencing were matter of aggravation ; but if *substantive* as judged, then the declaration gave no information as to the positions of the broken fence and trodden grass, nor fixed the locality of the trespasses by the mention of the grass and fences. That as the plaintiff had not newly assigned, but only traversed the excuse mentioned in the second plea, his replication was in effect "that the defendants had no such excuse as they stated in their plea for *such* trespasses as they therein admitted." That the excuse mentioned in the second plea was that there was a highway over the plaintiff's close, and that the fences broken were obstructing that way. That the application *de injuriâ* did not put in issue the averment in the plea *that the defendant broke down the fencing which stood on the way claimed by him*. That at the trial, the plaintiff proved that his close was fenced *all round*, and the defendants adduced evidence to go to the jury that they had a right of way over the close, so that *some* fencing must necessarily have stood upon that way, and therefore the plaintiff should have newly assigned the breaking of the fence at any other portion of the close than on the said way. That if the plaintiff meant to contend that the defendants had broken other fencing than that mentioned in the plea, they ought to have newly assigned, or to have newly assigned and also put the defendants' excuse in issue. That if the plaintiff meant to contend that the fencing broken down, was not, as complained of in the declaration, on, but out of, the road claimed by the defendants, he should have told defendants so by a new assignment, and not put them to the expense and trouble of proving such facts as they alleged for excess in their second plea. That although the declaration was general as to the fences, the plea narrowed the description of them to such portion as obstructed the way proved ; and that if the plaintiff did not mean to assent to such limitation, he should have apprised the defendants by a new assignment, that his declaration embraced more than was admitted by the second plea. That the issue joined on the second plea neither comprised the commission nor the manner of committing the trespasses

mentioned in the declaration. From the direction, the jury might have been misled into supposing that they ought to find for the defendants, unless they were satisfied that the fences broken were obstructing a highway, although the defendants proved that there was such a way over the close.

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The plaintiff's counsel in effect contended that the plea alleged in substance, that the defendants had a right-of-way over the close, and that they knocked down the fences mentioned in the declaration, *because* they were obstructing their exercise of that right. That the obstruction of the way was clearly the matter of *excuse* set up by the plea, for if the fences were not obstructing the way, the defendants had no excuse for knocking them down. That the matter of *excuse* was put in issue by the replication *de injuriâ*, of which the gist was, as contended by the defendant's counsel, that the defendants without the *cause*, i.e., *matter of excuse* alleged by them committed the trespasses. That the plaintiff by his replication (confessedly an informal one) said in effect, "I deny your right of way, but even supposing that you have it, I deny that the fences which you knocked down obstructed it." That upon the issue, therefore, the obstruction of the way was the principal question, and the proof of it lay upon the defendants. That the necessity of a *new assignment* must depend not only upon the *pleadings*, but also on the facts of a case, as its object is to correct a probable mistake into which the defendant may have fallen by confounding the acts complained of with other acts which he has committed; and that wherever therefore a defendant *has* exercised an admitted right over a plaintiff's property, and the plaintiff afterwards brings an action against him apparently for that exercise of right, the defendant may plead his right, and the plaintiff must, by a new assignment, show that he proceeds for some act not covered by the right.

The following cases and authorities were cited and referred to upon the argument:—*Sayre v. Rochford* (6); *Taylor v. Cole* (7); *Spilsbury v. Micklethwaite* (8); *Penn v. Ward* (9); *Timothy v. Simpson* (10); *Baillie v. Kell* (11); *Nash v. Welch* (12); *Neville v. Cooper* (13); *Phillips v. Howgate* (14); *Cowling v. Higginson* (15); *Webber v. Sparkes* (16); *Bracegirdle v. Peacock* (17); and the two following cases in that volume; *Bowen v. Jenkin* (18); *Rogers v. Custance* (19); *Chitty on Pleading, New Assignment*.

(6) 2 Wm. Bl. 1165. (7) 3 T. R. 292. (8) 1 Taunt. 146. (9) 2 C. M. & R. 338. (10) 1 C. M. & R. 757. (11) 4 Bing. N. C. 638. (12) 8 East. 394. (13) 2 C. & M. 329. (14) 5 B. & Ald. 220. (15) 4 M. & W. 245. (16) 10 M. & W. 485. (17) 8 Q. B. 174. (18) 6 A. & E. 911. (19) 1 Q. B. 77.

1850. We have considered the arguments urged before us on either side, and have consulted the authorities then cited, and also several others, amongst them *Robertson v. Ganslet* (20), to which we have subsequently here referred. Upon inspection of the plan together with the explanatory writing upon it, we think the two spaces coloured pink, with the intervening space coloured brown, might by the defendant be assumed to describe the *one* close mentioned in the declaration, and that the brown space represents a road across it; or else the defendants might have been embarrassed, by the plaintiff having in the declaration described the close by reference to a chart, containing a delineation of two spaces coloured pink, with a written explanation that the "part" coloured pink comprises the *locus in quo*. The two spaces on the chart might have embarrassed the defendants, unless (by adopting the plaintiff's assertion that they represented the locus) they were allowed to consider and deal with them as *one*, which they obviously could not do, unless the intervening space, coloured brown, was also considered as a portion of the same space in which they were. As, moreover, it appeared in the evidence that the road to Illawarra from Sydney was in the direction indicated by the chart, we think that it appeared in the evidence that there was a highway over the plaintiff's close, but not that any fences were obstructing it. We also think that it was a matter for the jury; under the issue joined, they would have been warranted in finding that there was no way over the close at the place where the defendant broke the fence.

Upon these pleadings and with reference to the facts declared in evidence at the trial, the question has arisen, whether the issue joined on the replication *de injuriâ*, has involved not only the denial of the way mentioned in the plea, but also the alleged obstruction to it.

For the solution of the question before us, we propose to consider the nature and effect of a new assignment, as the point of the defendant's argument is, that the plaintiff should have resorted to that proceeding. A new assignment is a form of averment by which a plaintiff explains to a defendant, that though his plea may contain matter of excuse for *such* wrongs as are mentioned in the declaration, it is no answer for *the* injury therein intended to be signified. It calls on defendant to answer another *such* cause of complaint as is mentioned in the declaration, besides that which the defendant excuses by his plea. It says, "you have excused *such* a wrong as is mentioned in the declaration, but not the *same* wrong." A new assignment therefore is substantially a traverse of the *quas est eadem*, but as it does not deny it in terms, it is obviously

an exception to the rule of pleading, that every proceeding on a record should confess and avoid the whole of, or traverse in its terms a material fact in the last preceding statement. Now as "the substantial rules of pleading are founded in strong sense, and in the soundest and closest logic," we cannot be surprised that a proceeding so exceptional to them as a new assignment, should be the most embarrassing part of the whole system. This exception, however, has been engrafted on the rules of pleading, because it has been considered in some instances that the grand object of pleading, viz., to inform an adversary and the court, is more likely to be effected by this breach than by the rigid observance of them. The necessity for the exception has arisen from the inadequacy of *one set of words* to indicate to a party *which* of several transactions equally describable by it, is intended by his opponent. If, in such a case, a defendant offers an excuse for one of such transactions, it would be unfair for the plaintiff to make the dispute depend on the defendant proving that it was the one which the plaintiff intended to complain of in his declaration. Justice, therefore, demands that the plaintiff should explain to him that he is proceeding for another than the one the defendant excuses, and give him an opportunity of answering the second instance to which he is referred. Now, a defendant may *wholly* mistake a declaration, as in trespass for assault and battery, wherein the plaintiff states usually that the defendant made *an* assault on him. If, in such a case, the defendant has made *two* assaults on the plaintiff—one under excusable circumstances, and another which was unjustifiable—he may, as the words of the declaration are equally applicable to both assaults, apply his defence to that for which he has an excuse. The plaintiff, therefore, instead of denying, in terms, that the assault justified is identical with that complained of, must explain to the defendant by a new assignment that he did not, by his declaration, intend the one the defendant mentioned in his plea, but another like it. By this new assignment, he tells the defendant, "For the purposes of this suit I will not deny that you committed an assault, under the excusable circumstances you mention, and, therefore, you need not prepare yourself to prove those circumstances at the trial; but I explain to you that, by my declaration, I meant to complain of another assault than the one committed under the circumstances you have mentioned in your plea; and I now call upon you to answer the second assault by pleading to this new assignment as if it were a declaration in a second action, or a second count of the declaration in this action." Again, the defendant may apply his plea only to *part* of the wrongs intended to be signified by the declaration, by reason of the words of the latter as completely

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describing what may be considered the part as they do the whole. As in the case of a declaration in trespass, where the plaintiff says that the defendant did, on divers days and times, break the plaintiff's close, &c. The defendant may have had a right of way over the close, and, therefore, on some occasions, may have entered on the close by using his right of way. But he may also have entered the close on parts distant from the way, for which latter the plaintiff may really have brought his action. But the language of the declaration does not inform him of that fact, for the words "the defendant broke and entered the plaintiff's close," are as applicable to one set of trespasses as the other. The defendant, therefore, in this case, may plead his right of way, and the plaintiff must explain to him, by a new assignment, that the grievance referred to by the declaration was not his usage of the way, but his going over the plaintiff's close out of that way. Again, when the declaration is framed like the one in this action, the defendant may, from the language, consider that the plaintiff is merely complaining that the defendant broke and entered his close *in such a manner* that he broke down the fences, trod down the grass, &c. That is, he may, from the language of the declaration, fairly imagine that the plaintiff has mentioned the breaking of the fences, treading down the grass, &c., not as substantive trespasses in addition to the entering, but merely as the aggravating way in which the close was entered, for the purpose of enhancing the damages. In such a case, the defendant may apply his plea to the mere breaking and entering the close, and then the plaintiff must explain, by a new assignment, that his declaration was intended to comprise, not only the breaking and entering the close, but also the prostrating the fences as independent trespasses.

Now, the language of the declaration in this case, so far as it relates to the matters enumerated at the commencement of the second plea, is, "That the defendants broke and entered the plaintiff's close, and *then*" (i.e., on the same occasion) "trod down the grass and prostrated the fences thereof." Hence the averment about treading down the grass and prostrating the fences might, we think, have been regarded by the defendants as descriptive rather of the manner of the entry complained of than of other substantive trespasses; and had the defendant so regarded that averment, he might have applied his justification to the entry alone, as that is obviously the *gist* (or principal part) of the grievances mentioned in the declaration. But the defendant has, by the enumeration of trespasses at the commencement of his second plea, shewed that he has considered the averment about the treading down the grass and prostrating the fences as being a complaint of substantive

trespasses, independent of the breaking and entering the close, and, as a justification, must be co-extensive with the trespasses to which it is applied, the obstruction of the way by the fences was necessarily alleged in the second plea, and upon traverse it became necessary for the defendant to prove it. See *Monfrivatt v. Smith* (21), and cases cited in note; *Taylor v. Cole* (22), *Dye v. Leatherdals* (23), *Fisherwood v. Cannon* (24), *Gates v. Bayley* (25), *Cheasley v. Barnes* (26). See also *Phillips v. Howgate* (28), *Bush v. Parker* (29), *Walsh v. Harris* (30), in this court, May, 9th, 1846; and *Neville v. Cooper* (31).

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Now as the defendant has treated the respective allegations about entering the close and prostrating the fences as substantive and different trespasses, there are on the pleadings before us two issues joined by the replication *de injuriâ*, viz., the existence of the causes mentioned in the second plea. If the plaintiff had by two replications split the second plea, and so traversed the way in one replication, and the obstruction by the fences of the way in the other, then the defendant ought to have succeeded (32). On the first of these issues according to *Webber v. Sparkes* (33), because he proved a way, and in exercise of it excused an entry in the plaintiff's close. And the plaintiff has not by new assignment given the defendant the opportunity of defending his commission of such an entry in the close, as is contained in the declaration, out of the way he proved at the trial; and on the second the verdict should have been for the plaintiff, according to *Bond v. Downton* (34), for we consider the gist of the issue evolved from the plaintiff's complaint respecting the trespass to the grass and fences was whether there was a way where the fences were prostrated. As we cannot see how the substantial denial of the matters in the second plea by the replication *de injuriâ* can make the proof of them different from that which would be required if each of those matters had been traversed in terms by separate replications, we think that the direction given at the last trial was partially incorrect, and the Jury should have been instructed to find their verdict on the issue joined by the replication *de injuriâ* so far as it related to the way for the defendant; and for the plaintiff on that issue so far as it related to treading down the grass and prostrating the fences, with damages confined accordingly.

We have considered and discussed the case of *Ellison v. Isles* (35), with some anxiety, as there are several passages in Lord Denman's

(21) 2 Camp. 175. (22) 3 T.R. 292. (23) 3 Wilson 20. (24) 3 T.R. 297.
(25) 2 Wilson 313. (26) 10 East 73. (28) 5 B. & Ald. 220. (29) 1 Bing. N. C.
72. (30) *Ante*, p. 339. (31) 2 C. & M. 329. (32) ? Succeeded on, &c. (33) 10
M. & W. 485. (34) 2 A. & E. 26. (35) 11 A. & E. 665.

1850. Judgment which appear to support the direction given at the trial ; we do think the pleadings in that case put the parties in a position so unlike that which has been caused by the replication in this suit, that the decision has no application to the case before us. *Robertson v. Gantlett* (36) might, we think, possibly have helped the plaintiff in this cause, if the plan had described one of the spaces coloured pink as being the place he passed on, and that it abutted on the road to Illawarra, for by such a description the defendant would have been informed that the action was not intended to complain of anything done on the highway. We therefore think that there is nothing in either of these cases to make us disturb the opinion we have pronounced. But as we clearly see that the damages were given for the prostration of the fences, and that the real struggle at the trial was, as to the existence of a way where those fences were broken, we order (the plaintiff consenting) that a verdict should now be entered as we think the Jury should at the trial have been instructed. Considering the smallness of the damages and the circumstances of the whole case, we think there ought not to be a new trial.

Order accordingly.

(36) 16 M. & W. 289.

REGINA v. MARRINGTON. (1)

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Quarter Sessions—Judgment by two magistrates, of whom one had not heard the case
—Special Case—13 Vic., No. 8.

Oct. 2.

Stephen C. J.
 Dickinson J.
 and
 Therry J.

A sentence pronounced under a statute giving jurisdiction to *two* magistrates is not good in a case, where, although two were present at the verdict, they were not the same two who were present at any former portion of the case; nor where the two present on the second day of a trial were not present on the first day.

A point cannot be reserved on the application of Counsel, except before verdict, under 13 Vic., No. 8.

The submission of a Special Case by the Chairman of Quarter Sessions, *prima facie* imports that the trial was not, when the application was made, wholly terminated.

THE defendant was indicted at the Quarter Sessions for the commission of a nuisance, and, being found guilty, was sentenced to pay a fine of £50, and to enter into recognizances to remove the nuisance within a certain time.

The trial lasted two days, but the magistrate, beside the Chairman of the Quarter Sessions, who presided at the commencement of the trial, did not remain on the Bench throughout, but, on the contrary, three or four different magistrates sat for a time during the trial. When the verdict was given, and sentence passed, the Chairman was the only magistrate on the Bench, though he stated that the absent magistrate had concurred, in the event of a verdict of guilty being found, that the fine should be £50. The absent magistrate, however, had not heard the recommendation to mercy accompanying the verdict of the jury. The objections of Mr. *Brenan*, who appeared for the defendant, were afterwards reduced into a special case.

The reserved judgment of the Court, after reference of the case back for amendment, was delivered, October 2, by

DICKINSON, J. In this case, which was a prosecution at the Court of Quarter Sessions for a nuisance, sundry questions were submitted to us by the Chairman, by a special case, stated (or purporting so to be) under the 13 Vic., No. 8. The principal point was whether the defendant was properly sentenced by two magistrates, of whom one was not present

(1) *The Sydney Morning Herald*, July 27, October 3 & 10, 1850; also 1 S.C.R. App. 11. Cited 1 S.C.R. 27; 3 S.C.R. 221; and 1 S.C.R., N.S., 258.

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before the delivery of the verdict; or whether he was properly tried, inasmuch as one of the only two magistrates who were present at the first portion of the trial, was not present either at the verdict, or at the latter portion of the trial. It appeared to us, that the trial and sentence were thereby vitiated. It was objected, however, on behalf of the Court, that we had nevertheless no jurisdiction in the matter; since the Act includes only points arising, and applications made, "during the trial"—whereas no question as to the *sentence* could have arisen, until after termination of the trial, and no application respecting the mis-trial was made, in point of fact, until after the trial. We therefore directed the Special Case, in pursuance of a provision in the Act, to be sent back for amendment; in order that it might be stated therein, whether at the time of the objection made, the verdict was or was not recorded.

A supplemented paper is now sent in, under the hand of the Chairman, in which, after referring to a certificate of the Clerk of the Peace (of which, except in so far as it is adopted by, and incorporated in the said paper, we can take no notice), he declares that, so far as his recollection serves, the statement of that officer is correct; and that, to the best of his knowledge and belief, the verdict was recorded before the objection was made for the defendant.

It appears to us, that the submission by the learned Chairman, in the first instance, of the Special Case, was a circumstance *prima facie* importing that the trial was not, when the application was made, wholly terminated; and that, before we could refuse to adjudicate on it, we ought to have a clear and distinct statement, if not by amendment of the case, yet in some equivalent manner, that the fact is otherwise. Now here we have no "amendment" properly so called, but a supplementary paper only. If, however, we regard this paper as an equivalent, we find no such clear and distinct statement, as we think was necessary. We cannot judicially say, as the matter now stands, that the Special Case ought not to have been submitted to us, and we must, therefore, give the defendant the benefit of our judgment on it.

That judgment is, that there was a mis-trial; and consequently, that no sentence could legally be passed on the defendant. The statute clearly confers jurisdiction on two magistrates only; and it seems to us as unreasonable to hold that a prisoner is lawfully under trial because two are present at the verdict, although not the same two who were present at any former portion of the case, or because two are present on the second day of the trial who were not present on the first day of the same trial, as it would be to hold, that one Judge of this Court, trying

a man for murder, might abandon his post on the second day, or for the latter half of one day to a colleague, who should eventually be succeeded by a third, by whom, in the absence of the others, the case should be summed up, and the prisoner condemned. For the Chairman of a Court of Quarter Sessions, though ordinarily (by the practice in such cases) the sole acting Judge, is in point of authority but one of two Judges ; of whom, each is an essential and integral portion of the Court, without whose participation, real or implied, the jurisdiction itself would cease to be.

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There will, therefore, be a direction issued to the Court, in this case, to vacate the judgment given ; and the fine inflicted, if paid, must of course be returned.

Order accordingly.

[IN CHAMBERS.]

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Sept. 18.

Stephen C. J.

TOWNS v. THE UNDERWRITERS OF THE
ISABELLA ANNA. (1)

Costs—Plaintiff successful twice on one issue, and unsuccessful as to the rest—Witnesses detained—De bene esse examination of several witnesses.

The plaintiff, who succeeded on one issue at the trial, and obtained a new trial, is entitled on succeeding on the same issue at the second trial, to have his costs of that issue at the first trial, and in connection therewith to a portion of the brief fees, but not to costs for searches which were equally necessary on the other issues.

The defendants in their costs on the other issues are entitled to expenses of detaining witnesses, if it appear reasonable to the Prothonotary, that they should have been so detained, rather than examined *de bene esse*; but if not, then the defendants are only entitled to the costs of one examination order in respect of all such. In deciding this point the Prothonotary is right in using the affidavit of increase, and in referring to the Judge's notes of the evidence, on the question of fact which is to guide his decision.

APPLICATION to review taxation. The following reserved judgment was delivered, with the concurrence of the other Judges, by—

THE CHIEF JUSTICE. I have conferred with the other Judges, on the several objections to the Prothonotary's taxation of costs in this case, and have reported to their Honors the arguments urged before me on both sides.

1st. We are clearly of opinion that the plaintiff is entitled to his costs of the issue found for him. He would plainly have been entitled to them had the first verdict remained, and we cannot see why he should lose them, so far as the first trial is concerned, because of a second trial having been granted. Had the defendants so pleased, they could have prevented the necessity of a second trial of that particular issue, by declining further to contest it; or they could have avoided the costs of a second adverse finding on it by giving notice that they should consent to a verdict for the plaintiff at such second trial. Having taken neither course, the defendants cannot justly complain that they are made to pay the costs of the second finding, as well as of the first.

Had the verdict at the second trial on this issue been different from that at the first trial, there might have been a question whether the plaintiff could have got the costs of it, notwithstanding his success on it

(1) *The Sydney Morning Herald*, Sept. 20, 1850. Cited 2 S.C.R. 11.

at such first trial. But here he has succeeded in this issue at both trials, and the costs of the first trial without any exception were to abide the event of the second.

2nd. As a portion of the brief must have related to, and have become necessary by reason of, this Issue, a portion of the fees paid with the brief (though doubtless a very small portion), may fairly be considered as paid on account of it. Those portions, therefore, we conceive, have been properly allowed for, as included in the costs of the Issue found for the plaintiff. The particular sums to be allowed we must leave exclusively to the Prothonotary. The Judges have repeatedly announced that unless the Taxing Officer is shown to be flagrantly in excess, or the reverse, with regard to particular items, they will not interfere with the discretion necessarily vested in him as to such matters. This is, unquestionably, the course invariably pursued by the Courts at home.

3rd. The division, however, by the Prothonotary, of the items of search, and other items of that nature, as in part referable to the second Issue, we think erroneous in principle; as they cannot be truly be said to have become necessary, by reason of such issue, but, on the contrary, the same items would equally have been chargeable, and charged, neither more nor less, although that issue had never been raised. The search for a Rejoinder, for instance, would have taken place in respect of the other Issues, and no additional labour or expense was occasioned in that particular, because there happened to be three Issues, instead of two.

The well-known rule, as to the division of Witnesses' expenses, affords the guide. If the Plaintiff called a Witness exclusively on this Issue, he is entitled to charge for such Witness. But, if the Witness was called on the other Issues also, on which the Plaintiff failed, there the Plaintiff is not entitled to any allowance from the Defendants, because no additional expense was occasioned, by getting his evidence equally on the successful Issue.

4th. As to the allowance of the expense, of keeping the Defendants' witnesses till the trial. The facts appear to be these. It was known, when the action was first threatened, that the whole contest would be as to the seaworthiness of the vessel; and the Defendants could not have been ignorant that the Plaintiff had it in his power to adduce strong evidence on that point, which it would be necessary for them to counter-vail. They therefore resolved (and very wisely, no doubt, for their own interests), to keep some of their intended Witnesses in Sydney, who, but for a promise of compensation, would have left the Colony. In point of fact, the Defendants thus kept (as I understand the case) eight

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1850. Witnesses, and now, having succeeded on that main and decisive issue, they claim to throw the whole expense of the detention on their adversary. The question is, whether we should (however important and just it may be, as a general principle, to secure to the successful party *all* his fair law costs, as far as may be done consistently with established rules of the law), permit the Defendants to do so.

Stephen C.J.

This question first came before Mr. Justice *Dickinson*, and he directed the Prothonotary, in substance, to allow those expenses, if that Officer should find that there were special circumstances, and grounds, which made it reasonable to detain the Witnesses, for examination before the Jury, instead of taking such examination *de bene esse*. If no such special matter existed, the Prothonotary was then only to allow so much, in respect of each Witness, as his *de bene esse* examination would have amounted to. The Prothonotary has, accordingly, allowed the expense of detaining two of the men, the carpenter and second mate—and has allowed the costs of a separate examination, in respect of each of the others. On these points, we are of opinion as follows :—

1. That the Prothonotary was right, in using the affidavit of increase, and in referring to the Judge's notes of the evidence, on the question of fact which was to guide his decision.

2. That the grounds and circumstances stated in his Report are sufficient to justify his conclusion, that the expense of detaining the two witnesses mentioned, was properly chargeable (considering the nature of the case) against the Plaintiff.

3. That, very possibly, the personal examination of the other five or six Witnesses might have been as useful, or very nearly so, to the Defendants ; but that these are matters, after all, incapable of demonstration either way : that the losing party is not compellable, however, to pay expenses not necessarily incurred by his adversary, or shown by ascertained facts to have been essential to the prosecution, or defence : and that the Prothonotary, in reporting the presence of the two principal Witnesses to have been essential, but that the others might as advantageously have been examined upstairs, is not shown to have been in the wrong.

4. That, however, in respect of the last-mentioned Witnesses, as they might have all been included in one Examination Order, the Prothonotary should have allowed for one such Order only, and taxed the other costs, as to such examination, on that principle.

The taxation will be reviewed, therefore on the several points, in accordance with the directions here intimated.

Order for review accordingly.

SLAPP v. WEBB. (1)

1850.

Distress—Replevin—Adoption of English law—Usage—7 Vic., No. 13, s. 4—2 Will. & Mary, c. 5, s. 2—Sheriff—Trespass ab initio—11 Geo. II, c. 19, s. 19.

Oct. 14.

Stephen C.J.
Dickinson J
and
Therry J.

The law of distress and replevin, so far as it respects the powers of seizing, detaining, and replevying of goods, is in force in this colony.

(*Seemle*), long usage alone, apart from 7 Vic., No. 13, s. 4, which treats the English law of distress as in force, could amount to an adoption. The power of selling a tenant's goods, when distrained, depends on 2 Will. & Mary, c. 5, s. 2, and is not in force here, unless it be preceded by *appraisement*, as required by the statute. The Court has no judicial knowledge of a long usage to sell the goods *without appraisement*, and the usage, even if proved to exist, would not be enforced.

Quære whether a sufficient appraisement can be here, and the Sheriff of the colony be considered to have the same powers as the Sheriff of "the county" in England.

The defendant is not a trespasser *ab initio*, by reason of the illegal sale, the several acts of trespass being divisible by 11 George II, c. 19, s. 19.

THE judgment of the Court was delivered, October 14, by—

THE CHIEF JUSTICE. This was an action of Trespass; in which, in the *first* Count, the Plaintiff complained that the Defendant entered the Plaintiff's farm and dwelling-house; and, in the *second* Count, that he seized and carried away divers of the Plaintiff's goods, and converted the same to his own use.

The defendant pleaded, 1st, that he entered and seized the goods on the premises for rent in arrear, and impounded and sold them (the same not having been replevied) therein; and 2ndly, a plea similar in all respects to the first, except in the description of the tenancy. To each of these pleas the plaintiff demurred on the grounds that neither the statute 2 Will. and Mary, c. 5, s. 2, which allows the selling of goods for rent, nor the statute 11 George 2, c. 19, s. 10, by which they may be impounded on the premises, nor even the law of distress and replevin, was in force in or applicable to this colony. The last ground, however, was abandoned; and the only point eventually insisted on was the illegality of the admitted sale.

The case was argued in the last term, by Mr. *Broadhurst* for the plaintiff, and by the *Solicitor-General* for the defendant. By the former

(1) *The Sydney Morning Herald*, Oct. 16, 1850; also 1 S.C.R. App. 54. Cited 6 S.C.R. 86; 11 N.S.W. L.R. 100.

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it was urged that the statute 2 Will. and Mary could not be applied, as there was here no "constable of the Hundred, Parish, or place" where the distress was taken; and that a landlord could not avail himself of the privilege of selling conferred on him, when the protection provided by the same statute for the tenant, that is to say of a sworn appraisement, cannot be put in force; that both the privilege and protection were contained in the same section; and that this case, consequently, could not be governed by our decision on the Statute of Uses, inasmuch as the provision as to enrolment, if a portion of the same Statute, was at all events a distinct enactment and in a different clause. For the defendant, it was on the contrary argued, that though the statutory provision as to taking the constable could not be applied, yet the power of selling had continually been exercised; and therefore, as that provision of the Statute had always been *applied*, that it was demonstrably applicable; that it was clear, from the wording of the enactment as to replevins, 7 Vic., No. 13, s. 4, that the Legislature considered the whole law of England respecting Distresses to be in force in the Colony; and that one part of a law, by constant usage in the colony or otherwise, might be in force, and not another. It was moreover suggested that, perhaps in this case, although by whom or under what circumstances, the pleadings did not disclose, there actually may have been an appraisement.

The authorities and statutes cited were, *Hill v. Barnes*, 2 Wm. Bl. 1135. *Ram on Judgments*, p. 56. The statutes 2 Will. and M., c. 5, and 11 Geo. II, c. 19, s. 10. The Colonial Act 7 Vic., No. 13, s. 4.—Also, some decisions in this Court; namely, *Macdonald v. Levy*, 8 June, 1833 (2); *re Schofield*, 22 September, 1838 (3); *re J. T. Wilson*, November, 1839 (4); *Terry v. Hart*, 7 April, 1834; and *Ryan v. Howell*, 5 October, 1848, (5).

We have considered this case, and the following are the opinions, which we have formed on it.

We have no doubt, that the law of Distress and Replevin, so far as it respects the powers of seizing, detaining, and replevying of goods, is in force in this colony. The case of *Terry v. Hart*, although very loosely reported, shows that such was recognised as the law, in this Court, in the year 1834; and if such were not at this day the law, the enactment in the 7 Vic., No. 13, s. 4, would be rendered nugatory.

We moreover have judicial cognizance by the great number of actions of Replevin brought, and of Avowries for rent filed, that there has been

a continual usage, independently of that enactment, amounting to adoption of the law. And it is quite possible, that this alone might make an enactment in force which otherwise would not have been (6). The fact of long usage, indeed, judicially known to us, formed one of the ground (with others) on which we held, in the case of *Doe v. Cummings*, 2nd November, 1846 (7), that the Statute of Uses was in force, though the enactment as to Inrolments, by which it was intended to be guarded, could not, for the want of machinery, be applied, and therefore was not in force.

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The power, however, of selling a tenant's goods, when distrained, is no necessary sequence of any of the aforesaid powers. It depends on the Statute of 2 W. and M., c. 5, s. 2, which enacts, that if the tenant shall not replevy within five days, then after notice of the distress given him, the landlord may "with the Sheriff or Under Sheriff of the County, or with the constable of the Hundred, Parish, or Place where the distress was taken, "cause the goods to be appraised by two sworn Appraisers, whom he is to swear:— 'And, *after such appraisement*, he may lawfully sell the goods so distrained," leaving the overplus of the proceeds, if any, in the hands of such Sheriff, Under Sheriff, or Constable, for the Owner's use. It appears to us to be hence quite clear, that we cannot separate the duty of appraising, from the power of selling; that the latter is expressly conferred *qualifiedly* only; that they are not distinct, or independent provisions; and, consequently, that, where there has been no appraisement, the statute confers no power.

The direction as to disposal of the overplus, after the sale, may or may not be independent and divisible; *that* will not affect the present question. The latter would not be in force, if there were no persons to receive the overplus; and still the power of selling might exist. But if there be no means of appraising, which is an inseparable condition preliminary to the sale, the power of selling could never lawfully be exercised. Accordingly, in England, although the proper constable could not be found, it has been decided that his assistance is nevertheless essential; and an appraisement by the constable of the adjoining parish was held to be of no value. *Avenell v. Croker* (8).

As to the assertion that there has been a continual and long established usage, to sell goods distrained on without appraising them, we have no judicial knowledge that such is the fact. We cannot call to mind, at present, one instance of any such usage having come before us.

(6) See 1 Chal. Coll. Opin., 130, 197, 220. (7) No sufficient report available.

(8) Moo. & Mal. 172.

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But we are quite clear as to this, that, if such a usage exists, it is not an adoption of the enactment, but in violation of it. The usage will not, of two independent enactments, have accepted one beneficial alike to all classes, but it will have taken a benefit, given on a condition, without complying with that condition; and will thereby have conferred a large power on one class of men, without affording to the other class that protection, which, by the same enactment, and in the same sentence, is expressly mentioned as a thing precedent to the exercise of the power.

Assuming, then, (as it seems to us that in this case we are bound to do,) that there was no appraisement before the sale, we think that the plaintiff is entitled to our judgment, as for a distinct act of trespass, in respect of that sale. It is true that as we held in *Windeyer v. Riddell*, in February, 1847 (9), the act of selling goods is not necessarily a trespass; and to the same effect is an observation of Baron Parke, in *Woods v. Durrant* (10). But, here, the plaintiff complains of the taking, and carrying away, and converting, of his goods; and the defendant, in each plea, confesses those acts, and justified them by alleging a distress, impounding, and sale of the goods, which several acts, he says, are the same trespasses of which the plaintiff complains. So that the selling is, in itself, by the defendant's own admission, a trespass. And we conclude that there was no appraisement, before such selling; simply because the pleas do not allege the fact, as they ought to and doubtless would have done, could it safely have been alleged.

The defendant, however, is entitled to judgment on the first count of the declaration, and in respect of the seizing and taking, mentioned in the second count. For, as a landlord may distrain, he clearly must enter for the purpose of distraining. Each of these acts, as well as the act of impounding on the premises, is obviously distinct from that of the sale.

The only question on which we feel a difficulty is, as to the said impounding. We have decided that the power of sale, given by the 2. Will. and Mary, is not in force in this colony, unless it be preceded by an appraisement, as required by the same statute. But it has not yet been necessary to express any opinion, whether there can be such an appraisement, in this colony, as would satisfy the statute. The whole case was argued, as if the only provision was the one respecting the Constable, a provision admitted not to be strictly applicable. The question, whether the Sheriff could or not discharge the duty, was left

untouched. If, however, the Sheriff of this colony can, by construction, be taken to have the same powers as, by the Statute, are conferred on the Sheriff of "*the County*," then an appraisement (it would seem) might be had, and so the enactment be capable of application.

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Until this question be decided, we are not in a position to say, whether the impounding was lawful or not. For we take it to be clear, that the 11 Geo. II, c. 19, s. 10, authorising an impounding on the premises, only in cases where there can by law be an appraisement and sale. Whence it follows, that, if there can be no appraisement, (and so, no sale,) there can be no such impounding. But, on these points, we have as yet heard no argument, and, before deciding them, we should accordingly desire one.

If, however, the plaintiff chooses to enter a *Nolle Prosequi* as to the impounding, or detaining of the goods, thereby confining his Writ of Inquiry to the sale only, he may do so. In that case, the present judgment will conclude the controversy between the parties.

It is hardly necessary to observe, that the divisibility of the several acts of trespass, in this case, is by force of the 11 Geo. II, c. 19, s. 19, but for which, the defendant would be liable, by reason of the illegal sale as a trespasser *ab initio*.

Judgment accordingly.

1850.

REGINA v. WRIGHT. (1)

Oct. 18.

Stephen C.J.
Dickinson J.
and
Therry J.

Jury—Challenge to array—11 Vic., No. 20, ss. 23 and 24.

A prisoner is not entitled to have the names of all the jurors on the panel read before exercising his right of challenge.

A challenge to the array should be made when the full jury appear in the box.

THE prisoner was indicted at the Quarter Sessions for a misdemeanor. The counsel for the prisoner at the trial wished to challenge the array of the Jury, and for that purpose wanted the whole of the names of the jurors on the panel to be called. The Chairman refused to allow this, twelve of the panel at the time being engaged, but took a note of the objection, and the trial proceeded, the defendant being found guilty.

Fisher, for the prisoner, now contended that on the authorities, and according to the Act of Council, 11 Vic., No. 20, ss. 23 and 24, the whole panel ought to have been called before the challenge to the array could be made.

Callaghan, for the Crown, was not called on.

The COURT held that there was nothing in the point. It was clear that the time when the prisoner ought to have challenged the array was, when the twelve jurymen were in the box, in other words, when the full jury appeared, who, if no objection were made, would try the prisoner.

Conviction affirmed.

(1) *The Sydney Morning Herald*, Oct. 19, 1850.

REGINA v. MOGAR. (1)

1850.

Murder—Associates in felony—Intention to commit felony—Evidence—Res geste—Dying declaration.

Oct. 18.

Stephen C.J.
Dickinson J.
and
Therry J.

The words "I have a wound in my throat, Mogo has settled me," uttered by a deceased person during an attack on him by the prisoner and others, are admissible in evidence against the prisoner, on a charge of murdering the deceased, as part of the *res gesta*; they are also evidence in conjunction with subsequent statements to the same effect, made under the fear of an immediate dissolution.

The prisoner was rightly convicted of murder, as he and the others were engaged in the commission of a felony, and evidently determined to effect their object at all hazards, and although the prisoner personally might not have inflicted the fatal wound.

THE prisoner was indicted for murdering one *Page* with a boomerang, and was found guilty. It appeared that the prisoner and other blacks attacked the deceased and another person, and though not clear, yet the evidence pointed to a black, named *Ugly*, as the dealer of the wound. At the time the wound was inflicted, the deceased cried out "that he was a dead man," and one of the witnesses said that the deceased uttered these words, "I have a wound in my throat; *Mogo* has settled me." The deceased died two days afterwards, but had made two more statements, to the same effect. It was now objected that these three statements were wrongly admitted at the trial. Exception was also taken to the ruling of His Honor, who told the Jury, that if the prisoner and the other blacks were associated for the purpose of committing a robbery, and any one of them (even without intending to kill or do grievous bodily harm) inflicted a deadly wound on the deceased, that the prisoner might be convicted of murder; also, if he were associated with his companions for the purpose of murdering or doing grievous bodily harm to the deceased, the Crown was entitled to a verdict of murder against the prisoner, whoever inflicted the mortal wound.

Holroyd, for the prisoner, cited *Rex v. Duffy* (2).

The *Solicitor-General*, for the Crown.

THE CHIEF JUSTICE said, that he would assume, as indeed the facts clearly showed, that the prisoner and the other blacks were associated

(1) *The Sydney Morning Herald*, Oct. 19, 1850. (2) 1 Lewin 194.

1850. for the common purpose of committing a felony ; he would further even
REGINA assume that the prisoner's hand was not the one that inflicted the
v. wound. His Honor then went on to say, that the ruling as to the
MOGAR. particular facts as they appeared in evidence was unexceptionable
Stephen C.J. —perhaps in the abstract, it would not be a true definition of murder.
As to the case cited from *Lewin*, it was so loosely and so shortly reported,
that it could not be regarded as an authority, opposed as it was to all
other decisions. His Honor said, the first declaration or statement
would be evidence as part of the *res gestæ*, but it would also be evidence,
in conjunction with the subsequent statements, as made by a person
under the fear of immediate dissolution. It is clear when these
declarations were made the deceased had given up all hope of surviving.
It was the province of the Judge to see that such declarations were
received properly, but that of the jury to judge of their value. As to
the whole case, he said he was of opinion that it was one of clear and
distinct murder against the prisoner, although he, personally, might not
have inflicted the wound, as he and the others were engaged in the
commission of a felony, and were evidently determined to effect their
object at all hazards.

DICKINSON, J., and TERRY, J., delivered judgments in accordance
with the above.

Conviction affirmed.

REGINA v. MULDOON. (1)

1850.

Oct. 25.

Evidence—Deposition of prisoner at another inquiry—Proof of markswoman's deposition—Confession.

Stephen C.J.
Dickinson J.
and
Therry J.

The prisoner was tried and convicted of aiding and abetting in the manslaughter of her husband, and at the trial a deposition, made by her before any person was charged with the crime, was admitted in evidence against her.

Held, the admission of the deposition as a confession was good; also that it was no objection that the deposition had been proved at the trial by the magistrate, who signed the jurat, and that the person who had witnessed the prisoner's "mark" was not called.

The deposition, although not expressed in the first person, or in the prisoner's exact words, was held admissible, as it was taken before the new Act in that behalf.

HIS HONOR the CHIEF JUSTICE said, this was a special case reserved under the late Act. The Court had considered the case, and were prepared at once to dispose of some of the points reserved. The first point was this—the prisoner was convicted at the Maitland Assizes, as an accessory after the fact, of aiding and abetting in the manslaughter of her husband. Against the prisoner, an affidavit was made by her at a time when there was no charge against her, or indeed any one, was adduced in evidence. It was objected that this was not admissible, as it was on oath. The Court were all agreed that there was nothing in this objection. The second objection also arose out of the same affidavit. The prisoner was a markswoman; the committing magistrate wrote the deposition in his own hand, and got a person of the name of *Long* to witness the mark of the prisoner. This deposition was received in evidence without calling *Long*. It was objected that *Long* ought to be called to prove the document, as it was like any other instrument to which witnesses had signed their names. The magistrate, however, who wrote the deposition was a witness at the trial, and he proved his signature to the deposition. The Court thought there was also nothing in this objection. The deposition, in point of fact, said his Honor, might be deemed to have had two witnesses, so that when a magistrate was called, it would not be necessary to call the second. The magistrate, again, was a statutory witness, and *Long's* name might be rejected altogether. His

(1) *The Sydney Morning Herald*, Oct. 26, 1850.

1850. Honor also intimated that it was not actually necessary, indeed, for any deponent in a criminal case to sign his deposition, so long as the committing magistrate signed the jurat. The third point also arose out of the same deposition. It appeared that the magistrate in writing the deposition in question did not write the exact words uttered by the prisoner, nor were the words used written in the first person. This deposition was at the trial used against the prisoner as a confession.

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The CHIEF JUSTICE said, the Court wished to hear argument on this point; it was highly desirable that it should be settled. No doubt it was a matter of the highest importance that all depositions should be taken in the first person, especially confessions, and as near as possible, too, in the very words of the party, even to slang expressions.

The *Attorney-General* appeared in support of the conviction, and admitting that it was desirable to take depositions in the first person, yet contended that, at the time the deposition in question was taken, it was not usual or customary in this colony so to take depositions.

The prisoner was not represented.

The COURT held that, upon the whole the deposition was admissible, inasmuch as the Magistrate was examined, and stated, on oath, that he had taken the statement down, that it was truly taken down, as he understood it, and moreover as there was nothing in the deposition to induce the Court to think the deposition had not been truly taken, or the prisoner had not used the words imputed to her. Again, too, under Sir *Robert Peel's* Act, it was only necessary to take so much of what a witness said as was material. This deposition, though subsequently used as a confession, was taken as a deposition only, and less particularity was required in taking a deposition than in a confession. The Court repeated the observation as to the importance of the magistrates taking depositions in the first person, and in the very words uttered. The new Act was explicit on this point, and probably the point would not occur again.

Conviction affirmed.

[IN EQUITY.]

In re J. T. HUGHES. (1)

1850.

*Separate estate of married woman—Restraint of anticipation—Sheriff—Execution for debt—Irregular sale—Abandonment.*Dec. 14.
Therry P.J.

A clause, restraining anticipation, in the settlement of the separate property of a married woman, is good against the Sheriff's execution. The husband of the married woman in such a case is justified in forcibly preventing the Sheriff's officer from delivering possession of the property in question to the purchaser at the Sheriff's sale. A sale by the Sheriff cannot be impeached on the ground of irregularity on the part of the Sheriff in the conduct of the sale, and a delivery under such a sale, in other respects valid and lawful, cannot lawfully be opposed; the party injured must seek redress from the person committing the irregularity.

(*Semble*), a temporary abandonment by the Sheriff of goods he is entitled to deliver, does not necessarily, until the return of the writ, defeat his right to deliver to the purchaser.

RULE *nisi*, granted to the Sheriff, calling upon Mr. *J. T. Hughes* to show cause why an attachment should not issue against him, for obstructing him (the Sheriff) in the performance of his duty.

Foster and *Donnelly* showed cause.

Broadhurst and *Fisher*, for the applicant.

After argument (the substance of which appears in the judgment),
Dec. 3,

Cur. adv. vult.

Judgment was delivered by his Honor, the *Primary Judge*, Dec. 14.

THERRY, P.J. The present application is for an attachment against Mr. *J. T. Hughes*, for contempt. The alleged contempt consists in resisting the process of this Court, by opposing the delivery of possession of certain furniture, stated to have been sold by the Sheriff under a writ of *Fi. Fa.*, issued in pursuance of a decree which directed certain costs to be paid out of the separate estate of *Esther Hughes*, in the hands of *Newton* and *Stubbs*, trustees under a deed of settlement, dated April 14, 1846, of the furniture assigned to them by *Rosetta Terry*, on the trusts therein declared. It was

(1) *The Sydney Morning Herald*, Dec. 4 and 16, 1850; also in a condensed form 7 S.C.R., 136, note. Cited 7 S.C.R., 136.

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admitted that the furniture levied upon and sold, was the identical goods and chattels contained in the schedule appended to the deed. The sale took place on the 30th of October, 1850, which was a sale of the right, title, and equitable interest of *Esther Hughes* in and to the household furniture and effects alleged to be vested in *Stubbs* and *Newton*, as trustees of *Esther Hughes*. *Robert Bunbury* was the bidder, to whom, on payment by him of £260, the Sheriff executed a bill of sale. The goods were not then delivered, and the Sheriff's bailiff, Mr. *Brown*, admits that he stated at the time of sale that the Sheriff sold all the right and title Mrs. *Hughes* had in the goods, but he would not undertake to deliver them to the purchaser. Subsequently, however, on the 6th of November, *Brown*, accompanied by the purchaser, *Bunbury*, and four police officers, attended at Albion House for the purpose of the delivery of the said goods to the purchaser. It was on this occasion that the officer met with the obstruction (as he states, in the performance of his duty) complained of from the defendant *Hughes*, and for which obstruction, constituting the alleged contempt, the present attachment is applied for against him. Although the avowed object of the application is an attachment for contempt, yet I apprehend the real object aimed at is to obtain the declaration of the opinion of the court, whether or not, by the sale of the right, title, and interest of *Esther Hughes*, the Sheriff was entitled, as part performance of his duty, to deliver over possession of the furniture specified in the schedule to the deed of settlement. If the Sheriff was entitled to deliver over the property, the attachment must go; but, if it was no part of his duty to do so, I apprehend the resistance that has been offered to the delivery does not constitute a contempt which this Court would punish by attachment. I may remark that I cannot regard Mr. *Hughes* quite in the light of a stranger, as he has been represented. He is the husband of the *cestui que* trust, and, being with her, in his or her house, where the furniture is, he may assist her, at least equally with her servants, in resisting a trespass, if the attempt of the delivery by the Sheriff can be regarded in that light. I shall then mainly address myself to the principal question:—Did a right to deliver possession of those goods accompany, or was it a consequent incident to the sale of the right, title, and interest of Mrs. *Hughes* in the goods themselves?

I propose, very briefly, first to notice one or two points much pressed upon my attention, but which are quite of subordinate importance to the principal point, to which I shall again presently advert. First, then, as to the alleged abandonment of the possession by the Sheriff, I am not at all satisfied that by a mere temporary abandonment, the

Sheriff is deprived of his right to deliver over possession of the goods sold by him. The doctrine is not carried further in *Acland v. Paynter* (2) than that he ought, in order to show it was not an abandonment, to be able to clearly account for it, as being caused by some urgent necessity, and to give satisfactory evidence of it. I am not prepared to say that there are not circumstances in the present case which go to explain and excuse the temporary abandonment, and as the Sheriff has authority to some extent until the return of the writ, I incline to the opinion (it is unnecessary to decide it) that if he were otherwise entitled to deliver the goods, there was no such an abandonment here as defeated his right to deliver the property to the purchaser. On another point, namely, the inadequate price which the goods sold for, on account of the Sheriff stating at the sale he would not undertake to deliver, yet accompanying the purchaser to effect the delivery several days afterwards, I certainly yield to the force of Mr. *Broadhurst's* argument, that for any loss or damage sustained by any irregularity on the part of the Sheriff in the conduct of the sale, the party injured by the irregularity seeks redress from the party committing it; but if the sale was in other respects valid and lawful, it cannot on that ground be disturbed, and a delivery under it cannot lawfully be opposed. As to the substitution by power of attorney of Miss *Hughes*, by one of the trustees in place of both of them—the utmost this contrivance could accomplish, is to substitute Miss *Hughes* in the place of the trustees, and constitute her a trustee. The possession is still in Mrs. *Hughes*, and she continues to have the profits of the furniture. The only other subordinate point I deem it requisite to notice, is the ingenious mode by which it is attempted to be shown that the writ was satisfied by payment previous to the date of the attempt at delivery by the Sheriff, so that though the writ was not returned, its exigency was satisfied, and the Sheriff had no right or authority to move afterwards in the matter. This begs the question, viz., that the writ was satisfied, but in fact it was not, until the delivery had been given. I take it that the Sheriff may convey land sold under an execution by a deed executed after the money is paid to him, and if so he could here have delivered possession.

The real difficulty in the present case, and one which the varying and conflicting decisions of the Courts at home render one of no easy solution, is whether the clause against anticipation in the deed of assignment of the furniture to trustees operates as an obstacle to the sale and delivery of that furniture to the purchasers by the Sheriff under the writ of *fi. fa.* issued in the cause.

(2) 8 Price 100.

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I will assume that it is conclusively decided by the writ that the separate estate of Mrs. *Hughes* unrestrained by a clause against anticipation, can be taken in execution, but then the questions arise—is that property which is separate estate, but to which a restrictive clause against anticipation attaches, such an estate as the present execution can lawfully reach; and does the clause in the deed of settlement operate to restrain anticipation? This is clearly a case of separate property, and that restraints may be imposed on the alienation of such separate property is settled beyond dispute. Is then the property in the present instance so settled? That is a question which, I apprehend, depends on the intentions of the settlor, and manifested in terms of the settlement. The intention to restrain must clearly appear, and for this purpose the precise language of the settlement must be regarded, for there certainly are cases, and recent ones too, in which although the intention may be pretty manifest, yet from the want of apt terms to express it, the Court has held that the married woman should take the property for her own sole and separate use and benefit and disposal, and with a power of anticipation. To this class of cases belong *Barrymore v. Ellis* (3), where an annuity was assigned to trustees in trust to pay the same to such persons as *Lady Barrymore* should, by any writing assigned by her, notwithstanding her coverture, appoint, but so as not to deprive herself of the benefit thereof by sole or other anticipation, and for want of such appointment in trust to pay the same to *Lady Barrymore for her separate use*. It was there held that *Lady Barrymore* had not only a limited power of appointment, but also under the latter part of the clause, the general uncontrolled dominion over the annuity, and therefore that she could anticipate and dispose of the income before it accrued. The decision pronounced there by the Vice-Chancellor of England, was, that as the clause restraining anticipation was not expressly extended to the gift as well as to the power, she might execute a valid assignment of this income. The deed there did not (as Mrs. *Rosetta Terry's* does) direct the trustees to pay the same into her own, &c., “but simply to her for her own sole use,” which the Vice-Chancellor regarded “as not different from a limitation to such uses as A shall in a certain manner appoint, and subject thereto to A generally.” His Honor adhered to this decision in *Brown v. Bamford* (4), in which the question arose on words then stated by the Vice-Chancellor to be the same in substance (though certainly not strictly so) as the words in *Barrymore v. Ellis*, and intimated that in order to settle on a lady property over which she was to have no power of anticipation, it was requisite to introduce a proviso that no receipt

(3) 8 Sim. 1.

(4) 11 Sim. 131.

should be a discharge to the trustees except a receipt given by the lady for the rents or dividends (according to the nature of the trust property) then actually become due. Subsequently in *Medley v. Horton* (5), the same doctrine was maintained, the only difference being that there the restraining clause did not apply to the power of appointment although it did to the gift.

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By these three last cited cases the doctrine established by the Vice-Chancellor is, that in order to settle property to the separate use of a *femme couverte*, the restraining clause should be expressly extended to the gift and to the power of appointment. If the authorities had rested here, I confess, I should have felt more difficulty in dealing with the present case than I at present entertain; but I find by the judgment of the Lord Chancellor, on appeal in *Brown v. Bamford* (6), Lord Lyndhurst, although he at first expressed an opinion in accordance with that of the Vice-Chancellor, ultimately on argument overruled it, saying, that the restriction against alienation extended to the whole gift, that such was the true construction of the bequest, and that it corresponded with what appeared to have been in that case the manifest intention of the testator. The following observations of his lordship apply with equal force to the deed in the present instance as they did to the will then under his lordship's consideration. "It was obviously the intention of the testator that the income of this property should be kept entire for the use of his daughter, and that it should not be charged or disposed of, except as the successive payments should become due; that it should not in any way be anticipated. It cannot reasonably be supposed that he would be so careful as he evidently was to exclude one mode of anticipation, and at the same time mean to have the property subject to alienation, even to its full extent, in another form."

Now I have diligently compared the terms of trust in *Brown v. Bamford* with those in the present deed of settlement, and I find them substantially the same, and the doctrine established in that judgment furnishes a guide for my judgment in the present instance. The right to appoint *there* as *here* is not to be exercised until the rents or other income become due, and then only to the extent of what is due. Thus, according to this construction, the clause against anticipation applied to an assignment by the married woman of her separate estate, as well as to an appointment in execution of her power, though it was not provided that her receipts *alone* should be a good discharge. This construction is further sustained by the judgment of V. C. K. Bruce, in

1850. *Baggett v. Meux* (7). A testator devised his estate to his daughter, a married woman, in fee, but with a declaration that she *should not sell, charge, mortgage, or encumber it*, followed by another declaration that she should take it for her own sole and separate use and benefit and disposal, and have the sole management thereof, independent of her husband, and free from his control or intermeddling. It was held that the restraining clause was not void, inasmuch as it must be taken in connexion, as well with the succeeding and preceding words, and therefore a security by way of equitable mortgage executed by the husband and wife to a party who had notice of the wife's title under the will, was void as against the wife. This decision, affirmed by the Lord Chancellor on appeal (8), overrules *Medley v. Horton* (5), to which I have referred. In the present case, the first part of the clause expresses that Mrs. *Hughes* shall not dispose by anticipation of the rents which shall accrue, and by the latter part those rents only, *i.e.*, those which shall have accrued are to be paid to her, so that the trustees can only pay her rents which they have already secured; and that shows clearly that the first part of the clause is intended to govern the whole of it. From these cases I arrive at the conclusion that the separate estate of a married woman without a clause against anticipation is liable to her debts, but that separate estate, restricted by such a clause, is not so liable where the language of the settlor is so plain and clear, as in the present instance, that the non-alienation or restrictive clause extends both to the separate estate and to the appointment in execution of her power.

The precise language of the clause in the present settlement is that the trustees are to allow Mrs. *Hughes* the rents, issues, and profits. Now rents and issues mean nearly the same thing, and imply a lease of furniture, but *profits* is another word for *advantages*, under which the possessor and user comes. If then the furniture, and other goods, was in Mrs. *Hughes*' house, the trustees were allowing her the profits of them, and they were in her possession. If then there had been no clause against anticipation, the Sheriff might and ought to have given possession under the execution, or of the rents and profits if the furniture had been leased. What then is the effect of the clause against anticipation? As a general principle that clause prevents the wife from parting with her life interest. The main object of it is to protect the wife's interest against the interference of the husband, but that protection would be defeated if by adopting the husband's debts the wife allowed her separate estate to be proceeded against, and execution to issue against it in satisfaction of

(7) 1 Coll. 138.

(8) 1 Phil. 627.

such debts. Such rents and issues *only* if the furniture had been leased, could be appointed by Mrs. *Hughes* as has become due. She could not appoint one shilling of rent by anticipation, and in like manner as to possession, which may be considered to represent the profits or advantages mentioned in the deed of settlement,—she could not anticipate it either. Beyond the point of time that she was in actual enjoyment of it, her interest in it was precluded by the clause of anticipation from extending. She had no *jus disponendi* as to the future, and as she could not dispose of any right she had to it—neither, in my opinion, could the Sheriff do so. If Mrs. *Hughes* could not herself defeat the claim by anticipation, it is equally valid and available, in my opinion, for the protection of the property against the Sheriff's execution, which is in fact an anticipation. On the whole then, I arrive at the conclusion that the Sheriff would have been justified in delivering possession, if there had been no clause against anticipation, because the possession for Mrs. *Hughes*' life could have been delivered; but that clause I think prevented him from settling any *future* rents; if the chattels had been leased, or any *future* right of possession: in other words, it operated as a restraining clause against the disposal of rents and issues, except as to rents and issues already due, and altogether as restrictive of the sale of *future* right of possession. The application must therefore be dismissed with costs.

Mr. BROADHURST said, that as the application was on behalf of the Sheriff, it should not be dismissed with costs.

His HONOR said, if Mr. *Broadhurst* could produce any authority to show why there should be an exception in favour of the Sheriff to the rule that a party succeeding was entitled to his costs he might mention the matter again. He would, therefore, for the present, reserve the question of costs.

Application dismissed.

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In re
HUGHES.

Therry P.J.

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LAWSON v. WESTON AND ANOTHER. (1)

Dec. 30.

Stephen C. J.
Dickinson J.
and
Therry J.

Highway—Presumption of dedication—Long user—Interruption of user.

To constitute the dedication of a roadway to the public, there must have existed, in the mind of the owner of the soil, an intention to dedicate it.

Long user of a roadway by the public is evidence ordinarily of a dedication.

An act done by an owner to notify his dissent must be decided and unequivocal in its character to rebut the presumption raised by continual user.

The public may diverge from a road, if it be rendered impassable, whether by accident or the intentional obstruction of the same.

New trial motion.—The action was for trespass to land, and the pleas were, first, not guilty, and second, a dedication by the plaintiff to the public of a right of way over the land, whereon the alleged trespass had taken place.

The case was tried before His Honor Mr. Justice *Dickinson*, whose summing up was to the effect that there was no doubt as to which way the verdict ought to be on the first issue. The evidence was clear to prove that a trespass had been committed. The struggle was on the question raised by the second plea, viz., as to the right of road. A road cannot be a highway unless it leads to a public place. A highway, except where made by the express enactment of the legislature, derives its existence from a dedication to the public by the owner of the land, over which the highway extends, of a right of passage over it; and this dedication, though it be not made in express terms, as it indeed seldom is, may and will be presumed from an uninterrupted use by the public of the right of way claimed. Two questions therefore arose here; first, whether there has been a usage; and secondly, whether it has been interrupted. Having made up their minds as to the usage, was there an intentional dedication by either of the former owners of the land? They need not find which of the three did dedicate, so long as they were satisfied an intentional dedication took place. The question was, was the usage of the road explainable otherwise than by a dedication? If it were, for instance, by a lying-by on the part of the owner, in not asserting his rights to exclude the public, there would be no dedication. To find for the defendant they must be satisfied that an intentional dedication had

(1) *The Sydney Morning Herald*, Nov. 27, Dec. 31, 1850; and March 27, 1851.

taken place. Usage was evidence of a dedication, but might be rebutted by other circumstances. The longer the usage, the safer the deduction of dedication (2).

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The jury on the second issue returned a verdict for the defendants.

A new trial was moved for, December 30, by—

The *Solicitor-General* and *Broadhurst*, for the plaintiff. The verdict was against both law and evidence. The direction of His Honor was that there must be specific evidence of dedication. No amount of usurpation would prove this. There was no intention of abandoning ownership, but merely a permissive user for the convenience of neighbours. There was evidence that one person had been prevented from using the way.

Foster and *Darvall*, *contra*. There was abundant evidence to raise the presumption of dedication. Sixteen persons were proved to have continually passed without objection. An intention to interrupt the user would have been evidenced, if it had existed, by more than one interruption.

The CHIEF JUSTICE was not prepared to say that the verdict was a mistaken one. Upon the whole, however, he was of opinion that a new trial ought to be granted on payment of costs. The question at issue was one of great importance as respected the whole colony, and of peculiarly great importance as respected the interests of this plaintiff and the owners of the adjacent lands. It ought not, therefore, to be decided hastily upon evidence in any way defective; it would consequently be inexpedient and unwise to decide such a question without again submitting it to the investigation of a jury. As to the law of the case, his own opinion was that there must be an intention to dedicate. A man could not be said to give without meaning to give. But the intention to dedicate as well as the actual dedication might be shown by evidence of user. Uninterrupted user must raise such a presumption of an intention to dedicate a road to the public as would justify them in assuming that there had been really such an intention. But it was not necessary for a jury to assume that at some particular moment the person who was said to have dedicated the road to the public had conceived a distinct and express idea of making such a dedication. There were few if any cases in which any such an idea as this had entered the minds of the parties who were presumed by the operation of law to have conceded

(2) From the report of the first trial, *Sydney Morning Herald*, Nov. 27, 1850.

1850. to the public a right of road. If a man permitted the public to use a particular piece of land as a road to such an extent and for such a length of time as to create a belief that he meant to dedicate to their service, he must be assumed to have contemplated and to have intended the natural effect of his own proceedings. If he meant to retain possession of his property, he would naturally exercise at times certain acts of ownership to show that the use of the land as a road must only be understood to be permissive.

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DICKINSON, J., was of opinion that the direction in this case was perfectly correct, and that the evidence did not, according to that direction, sustain the verdict which had been returned. There might have been sufficient evidence of user to amount to proof of an intention to dedicate; but, under the peculiar circumstances of the present case, this evidence would be equally consistent with a permissive user only. Where evidence went to represent two sets of facts, it proved neither, and it was desirable, therefore, that there should be a second investigation. As to the direction, the question in this case was dedication or no dedication; and no man could be held to dedicate without having intended to dedicate. The learned Judge quoted the authorities of *Park, B., Tindale, C.J., Williams, J., and Paterson, J.*, to show that no other principles than those which had been laid down in this direction could be held to govern the present case.

THERRY, J., was also of opinion, for the reasons already assigned, that a new trial must be granted. But on whatever judge the duty of trying the case a second time might fall, no other direction, he said, could be given than that of the learned judge before whom the first trial took place.

A new trial was therefore ordered of the second issue. The case to be tried by a special jury of twelve, and the defendant to be considered as having applied for this jury.

The case came on for trial again on March 24, 25, and 26, 1851, before His Honor the *Chief Justice*, and a verdict was again returned for the defendant.

His HONOR summed up the case to the Jury as follows:—

1st. To constitute the dedication of a roadway to the Public, there must have existed, in the mind of the owner of the soil, an *intention* to dedicate it. Mere sufferance of an user, therefore, by negligence, or as a matter of temporary favour, will not amount to a dedication.

2nd. But, frequent and long continued user of the roadway, by the Public, is ordinarily evidence of a dedication; for negligence on the part of the owner, or ignorance of his rights, or indifference to them, will not be presumed. This evidence will be more or less conclusive, according to circumstances; but particularly, according to the length of the time, and the number of the instances of user.

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3rd. Nevertheless, however long that time or numerous those instances, any open act or distinct circumstances, done or caused by the owner, indicating and notifying an intention *not* to dedicate, will be strong evidence against the dedication. But it is essential to observe, that if, at *any* time, by *any* owner, a dedication (that is, a designed and intentional dedication) took place, that dedication could not afterwards be recalled, either by him or any subsequent owner.

4th. The act or circumstance must be, in fact, for the purpose of exercising the right of dissent, and notifying that right to the public. The putting up of a fence across the road, so as to prevent access to it, would be one of the strongest instances of such an act; and, if there were a gateway left in it, but the gate was generally or often kept locked, the inference from the act would remain the same. The erection of such a fence, however, with a slip rail in it at the point of intersection with the road, or a gate secured by a hasp only, may have been for no purpose of dissent and obstruction. It may have been, possibly, for the very purpose of saving the right of the public, while at the same time protecting the owner, by preventing cattle from trespassing over the land on either side. In the absence of any such act or circumstance for the purpose of expressing and notifying dissent, the user by the public is evidence that the owner *intended* a dedication.

5th. As the purpose must be to *notify* dissent or non-dedication, the means used should be such as to answer that purpose, in order that the public, being aware of the denial of their right to use the road, may assert that right by forcibly removing the obstruction, or otherwise opposing the act done in disparagement of the right. If, therefore, from the nature of the interruption (and from the fact of similar instances of obstruction being common, in known and recognised Public Roads), the public would have been likely to misunderstand its purpose and object, the fact of the obstruction itself will be of much less value obviously than an interruption decided and unequivocal in its character.

6th. With respect to any change in the direction of the Road, this may happen in various ways:—by the diverging of passengers, without

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the consent of the Owner of the soil, because of the impassable state of the true or original line, or by the substitution of a new line, as in the case of the original one, by *dedication*; or it may be, in certain cases, by public authority. If there be a public road, whether by dedication or otherwise, and it becomes impassable from any cause, the public may diverge as of right, taking care, of course, to diverge no more than is necessary, and to do no damage to the soil which can possibly be avoided. This is clearly the law, where a road becomes impassable by reason of floods, or other accident; and the same law will equally apply, on principle and in reason, where the cause is an act of the owner, such as the ploughing up of the roadway, or putting a fence across it, producing the same result. The passengers are no more bound to procure and use axes, to cut down any such obstruction, to enable them to traverse the proper line, than they would be to obtain and use material for repairing it, in case of an obstruction by the act of God. If, on the other hand, the diverging has been by *consent* of the owner, there will be a new right created by "dedication." In determining whether there has been such a consent or dedication, the same considerations will arise for inquiry, as apply to and govern the case of the original line.

The Jury retired for a quarter of an hour, and on their return into Court found a verdict for the defendant. They also added at his Honor's request that they believed the slip rails were put up for the purpose of keeping the cattle in, and not as an obstruction to the public.

[IN CHAMBERS.]

REGINA v. BUTTERWORTH. (1)

1851.

Feb. 21.

*Gaming—14 Vic., No. 9—“Common gaming house”—Committal to “nearest” gaol
amendment of conviction.*

Stephen C.J.

A “common gaming house” is one, in which games are commonly played with cards, dice, balls, or other implements ordinarily used in gaming, whether such games be in themselves unlawful or not; such games being played, not for the recreation merely of the keeper and his family, and being played habitually or very frequently. It is immaterial whether they be for any stake or wager, or not. Although it did not appear by the warrant or the conviction that the prisoner, convicted of keeping a common gaming house, was a person “found” in a gaming house, or “brought before” the justices, under a search warrant, these facts were shown by the depositions and other proceedings, and it was not necessary therefore to proceed by information, under the Gaming Act, 14 Vic., No. 9, sec. 1, but the conviction could be amended, by virtue of 14 Vic., No. 43, s. 9. The committal of the prisoner at Windsor to the Parramatta Gaol was illegal, the Gaming Act requiring such committal to be to the nearest gaol, and the Gaol Act, 4 Vic., No. 29, having constituted a gaol establishment at Windsor, although this prison was at the time of the committal without officers.

THE prisoner was convicted by the justices at Windsor of keeping a common gaming house in the town of Windsor, against the statute, 14 Vic., No. 9, s. 1, and sentenced to be imprisoned in Parramatta Gaol, with hard labour, for three months. A writ of *Habeas Corpus* having been granted, on the return before the *Chief Justice*, Mr. *Nichols*, for the prisoner, objected to the validity of the proceedings. His Honor, after consideration, delivered the following judgment, February 21 :—

THE CHIEF JUSTICE. I have considered the objections to the conviction and commitment in this case, in connection with the Act 14 Vic., No. 9, and the decisions on the subject of gaming and common gaming houses; as also in connection with the Gaol Act and Schedule thereto; and the following is my judgment on the several points :—

The 14 Vic., No. 9, appears to be only a copy of the recent English Gaming Act, but it is, nevertheless, one of the most ill-drawn and perplexing enactments I ever read. Its provisions, therefore, are very difficult to be understood, and the cases under the previous statutes (I

(1) *The Sydney Morning Herald*, Feb. 24, 1851. Cited 1 S.C.R. 184; 2 S.C.R. 185; 2 S.C.R. 260; 8 N.S.W., L.R. 62; 8 N.S.W., L.R., 412.

1851. have seen none under the new law), do not afford any guide. It is quite possible, therefore, that a different opinion may be formed as to the true construction of this confused piece of legislation; and for this reason, as the subject is important, it may be desirable to obtain at an early day the decision of the Full Court upon it.

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It does not appear by the warrant, or the conviction, that *Butterworth* was a person "found" in a gaming-house, or "brought before" the justices, under a search warrant. And it is not stated, nor is it the fact, that he was convicted on any "information" laid before them. But by the depositions and other proceedings before me, it appears that he was so found and brought: and therefore, in my opinion (on the best consideration I can give the Act, more particularly in its first section), it was not necessary for the prosecutor to proceed by information. Consequently, I should allow the conviction to be now *amended* (under the late Act of 14 Vic., No. 43, s. 9), by inserting therein the facts in question, were it not that there is another defect, presently to be mentioned, which no amendment in my power to authorise could remedy.

I think nothing of the objection respecting the substitution of *Butterworth's* name for *Freeman's* in the search warrant. The substitution operated nothing, for the warrant had then already done its work. Neither was it necessary, in the search warrant, or in the complaint and information on which it issued, to mention any name. That information, on the other hand, was not one which could have supported any conviction, because it was merely the initiatory step for procuring the search warrant; and it was for that purpose (I may observe in passing) unnecessarily positive, since the Act only requires *reasonable suspicion and common report* to justify such a warrant.

Whether the keeper of a gaming house could be convicted under the 14 Vic., No. 9, in any case where no search warrant had previously issued, is (on the peculiar wording of this enactment) a very doubtful question. I am not bound, however, to give any opinion on that point. He would still be open to prosecution at the common law.

Notwithstanding the difficulty introduced by the use of the words "unlawful game" in sections 2 and 4, I am of opinion that a *common gaming house* is one in which games are commonly played with cards, dice, balls, or other implements ordinarily used in gaming, whether such games be in themselves unlawful or not; such games being played, not for the recreation merely of the keeper and his family, and being played

habitually or very frequently ; and I think it immaterial, if so played, whether they be for any stake or wager, or not. By s. 3 no proof of playing for a stake or wager is required. There is nothing said, as in s. 4, about *prima facie* proof. And in this same s. 4 the finding of any such cards, dice, or balls upon a search warrant, as here, is evidence (till the contrary be shown) that the house was in fact a common gaming house.

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The point is one, however, I admit, of great doubt. Section 3 would seem, moreover, not to apply to the present case, because *Butterworth* was not prosecuted on "indictment or information," as already observed. But as *balls* are expressly called implements of gaming, and as I can find no definition of what is an "unlawful" game, but all playing is gaming, or not, according to circumstances, and gaming becomes then only unlawful in the individual playing (except in a "common gaming house"), when it is for excessive stakes, or otherwise than *bona fide* for recreation, I think that the unlawfulness of the game, in itself, at which the parties played in this case, was not a question for inquiry. Why the words "unlawful game" were introduced I confess that I cannot understand. A solution may be found, perhaps, on some future occasion.

The only remaining objection, therefore, is that which respects the particular gaol to which *Butterworth* has been committed ; and this, however irrespective it may be of the merits of the case, I am of opinion cannot be got over. The Gaming Act requires that the commitment shall be to the nearest gaol. The offence, if committed at all, was committed in Windsor, and the conviction was in Windsor. Now, by the Gaol Act (of which we are, of course, bound to have knowledge), there is a public gaol established at Windsor. There is no power given by the Act to discontinue any gaol so established. The Governor may appoint new gaols ; but no power is given him to abolish any of the existing gaols. Now it is suggested, and the fact may be so, that there are no officers at the Windsor Gaol, and that, practically, it has been abolished by the discontinuance of the building for gaol purposes. But supposing all this to be true (of which I have no knowledge whatever), the magistrates should have made it appear distinctly on the proceedings, and have stated that Parramatta, in truth, *was* the "nearest" gaol. Possibly, this might have removed the objection. I do not say that it would, for the point requires consideration. The Legislature has, by express enactment, established a gaol at Windsor, and has never by any other enactment abolished that gaol. Can the judges hold, in such a state of things, that merely because there is no actual gaol establishment there, a man can

1851. be sent to the *next* nearest gaol? Had the Windsor Gaol been burned, or otherwise made non-existent, the nearest gaol would have been Parramatta, doubtless. But whether the absence of officers deprives the building of its character as a gaol, *that character having been assigned to it by an express enactment still in force*, I do very much question.

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It is sufficient to say, however, at present, that the necessary facts to raise that question are not before me. The prisoner, therefore, must be discharged.

THE BANK OF AUSTRALASIA v. FRAZER AND WIFE. (1)

1851

Scire Facias on a judgment return of two *nihils*—Defendants out of the jurisdiction—
Standing Rule 88—English Practice.

April 2.

Stephen C.J.
Dickinson J.
and
Therry J.

Persons not resident in the Colony are not liable to a judgment upon the matters here made equivalent to the return of two *nihils* to a *Sci. Fa.*, requiring them, as shareholders in a certain Company, to show cause why they should not satisfy a judgment obtained against the said Company (2). The English practice, dispensing with actual service, never could have been applicable to cases, in which the defendant was at no time within the jurisdiction of the English Courts.

THE reserved judgment of the Court was delivered by—

THE CHIEF JUSTICE. A judgment having been obtained in this Court, by the Bank of Australasia, against the then manager of the Company carrying on business in this colony called the Bank of Australia, for a debt due by the latter to the former establishment, a *Scire Facias* by leave of a judge was sued out against the defendants, as members of the latter body. It appears that the defendants, never having been in this colony, could not be found, and that the *Sci. Fa.* was served on certain parties, who were sworn, on affidavit, to have acted in the colony as the defendants' attorneys, on previous occasions, in executing the deed of co-partnership of the Company, and receiving the dividends. The plaintiff, moreover, caused notice of the issue of the writ to be issued by the Sheriff in the *Gazette*; requiring the defendants (in terms of the 88th Standing Rule) to appear at a certain day and show cause, according to the exigency of the writ. The defendants failed to appear according to that notice, and the plaintiffs then under the said 88th Rule signed judgment against them.

In the following term, Mr. *Fisher*, on behalf of the defendants, but without instructions from them, moved to set that judgment aside, on the ground that the 88th Rule did not apply to defendants never resident in the Colony, and that the defendants were entitled to notice personally. He urged, that it was contrary to natural justice, that a judgment should pass against a party who had no opportunity of contesting the proceeding on which it was founded; and he contended that

(1) *The Sydney Morning Herald*, April 3, 1851.

(2) The 88th Standing Rule provides that, in case the defendant cannot be found, on the return to the writ of *Sci. Fa.*, a Judge may order a notice to be inserted in the *Gazette*, and on the defendant failing to appear judgment may be had as on the return of two *nihils* at Westminster.

1851. the English practice of treating *two nihilis* as equivalent to a *scire feci*,
 BANK OF did not apply, where the writ was issued, as in this case, for the purpose
 AUSTRALASIA of introducing a new person on the record. He referred to *Becquet v.*
 v. of introducing a new person on the record. He referred to *Becquet v.*
 FRAZER. *McCarthy* (3), and to *Don. v. Lippman* (4), and the decisions cited in
 Stephen C.J. those cases; also to *Coysgarne v. Fly* (5); *Bagwall v. Gray* (6); *Smith*
v. Crane (7); *Bedington v. Bedington* (8); and to *Arch. Pr.* (Ed. 1840),
 p. 1021.

The *Solicitor-General*, Mr. *Foster*, and Mr. *Broadhurst*, for the Plaintiffs, submitted that the judgment was properly signed. They had done, they said all that was possible. It appeared by the affidavits, on which the leave to issue the writ was obtained, that the defendants were shareholders in the Bank of Australia; and that they had attorneys in this colony, who signed the Bank Deed and received the dividends for them. The writ has been served on those persons. The plaintiffs had followed the English practice, as far as they could by obtaining a Judge's order to issue the writ; and they had also adopted the practice which was prescribed by the 88th rule of this Court. The plaintiffs had no notice or knowledge of the residence of shareholders in the Bank of Australia. The judgment, they observed, was not to affect the defendants elsewhere; but to operate only on property which they had in this colony; and if the defendants sustained any injustice they had their remedy by an *audita querela*. They cited *Gurney v. Hardenberg* (9); *Douglas v. Forrest* (10); *Turner v. Davis* (11); also p. 1078 and 9 of *Arch. Pr.* (Ed. 1840), and pages 91 and 261 of *Stephen's Practice* in this Court.

Mr. *Fisher*, in reply, observed, that the question "member or no" could not be tried on affidavits; that the introducing of a shareholder on the record of a judgment, obtained against the public officer of a company, was in effect the introduction of a new party; and that the case of *Bail* was an exception, grounded on the peculiar reason that they are bound to watch the Sheriff's Office. He referred to the judgment of Baron *Parke*, in *Harwood v. Law* (12); *Bosanquet v. Ransford* (13); *Dodgson v. Scott* (14); and some others.

We have very fully considered this case, and referred to the authorities cited; and we are of opinion that the judgment against the defendants must be set aside.

(3) 2 B. and Ad. 951. (4) 5 Cl. and Fin. 21. (5) 2 Wm. Bl. 995. (6) 2 Wm. Bl. 1140. (7) 8 Moore C.P. 8. (8) 5 Bing. 234. (9) 1 Taunt. 457. (10) 4 Bing. 686. (11) 2 Vn. Wms. Saund. 148a, and see p. 72 t, note s. (12) 7 M. & W. 203. (13) 11 A. & E. 520. (14) 2 Exch. Rep. 457.

The 88th Standing Rule of this Court, on which the plaintiffs rely, is to the following effect :—It provides that writs of *scire facias* may be made returnable at any time, in the same manner as other process ; that a copy of every such writ shall be served upon the defendant, without any summons, and upon proof of such service, shall amount to a *scire feci*, and that, in case the defendant cannot be found, a Judge may order the Sheriff to cause notice of the writ to be inserted in the *Gazette* requiring the defendant to appear at a certain day, and show cause according to the exigency of such writ ; and if the defendant shall fail to appear according to such notice, “such default shall be as sufficient to found a judgment, as two *nihils* returned by the law and practice of the King’s Courts at Westminster.” And the question under that rule, as it appears to us, is identical with the following :—“Could a judgment in any of the courts at Westminster be had against an individual who never was in England ; but resided in this colony, being, however, a shareholder in an English Joint Stock Banking Company, upon two *nihils* returned to a *scire facias*, issued to enforce a judgment obtained against the Public Officer of such Company.

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Now, before the 81st Rule of Hilary Term, 4 Wm. IV, there is no doubt that in certain cases, if not in all, according to the practice of the Court of Queen’s Bench, by which this Court is guided in cases not otherwise provided for, the return of two *nihils* to a *scire facias* was deemed equivalent to actual service of the writ, on the person to be affected by it. This practice is of ancient date, and the reason of it is not clear upon the decisions. In the cases of a *scire facias* against Bail, however, it may easily be understood, and it is doubtless that suggested Lord *Kenyon*, in *Clarke v. Bradshaw* (15). Bail are considered the gaolers of their principal, and they undertake that he shall be forthcoming when called upon. This is properly at the return of the *capias*. Whatever time they are allowed to render him, afterwards, is by the indulgence of the Court. This either is by two writs of *scire facias*, returned *nihil* upon each, or one such writ, and a summons, with a return of *scire feci*, after the writ has lain a certain time in the office. The Bail are bound to watch these proceedings, and to have their principal ready at the plaintiff’s call. And, as this was the practice with regard to Bail, who are *conditional* judgment debtors, we can understand the same rule being applied to *absolute* judgment debtors. For such parties, having suffered judgment, know that they are liable to execution, and ought to pay the money ; or, by watching the Sheriff’s office,

1851. should be ready to show why no execution ought to issue. But, though
 BANK OF it seems to be laid down in the text books, that the rule in question is
 AUSTRALASIA applicable to all cases, we do not so readily comprehend how it could
 v. with propriety be applied, where a *sci. fa.* issues against a person not
 FRAZER. named on the record, or necessarily cognizant of the record. In the
 Stephen C.J. two former cases the parties know that they are liable to be called on
 by writ, and it may not be unreasonable to expect that they should
 inquire of the Sheriff if he has one. But, on the supposition that the
 person called on by *sci. fa.* is individually a *stranger* to the record, how
 can he be expected to anticipate an execution against him, *upon a*
judgment of which he probably knows nothing?

Considering the defendants in the case as, in fact, strangers to the judgment against the Bank of Australia, we are strongly inclined to think, upon the reason of the thing, and the language of the writ, that at no time could a judgment have been signed against them, until after they had been personally served with the writ. But allowing that, according to the old practice, the rule dispensing with service was applied to strangers to the record, it is still to be observed that, in none of the cases cited, were the strangers to the Record such persons as members of a Joint Stock Company. In this case there has been no judgment specifically against the debtors of the plaintiffs, that is to say, against the company called the Bank of Australia, but merely against the public officers of that bank. To make any shareholder liable to that judgment, he must be brought on the record by *scire facias*, because he is a *stranger*. But as he can only be made liable on account of his membership he ought to have an opportunity of contesting that fact, and the question "membership or not" must be determined by a jury. Hence it appears to us to be clear, that persons so situated are entitled to be actually called before a Jury, and cannot be rendered liable, on proof by affidavit of their membership. We conceive, therefore, that, had such a Judgment as the one sought to be enforced here been obtained at Westminster, and a *Sci. Fa.* been issued out of one of the Courts there against persons resident in this colony, (and strangers to the Record, as these defendants are), seeking to have execution against them, such persons would not have been liable to a Judgment on the *Sci. Fa.* upon two *Nihilis* returned only:—and, if so the Judgment in this case was erroneous, on matters made *equivalent* to two *Nihilis*.

The several objections made to the necessity for actual service, that, being members, the defendants are represented by the public officer, and therefore in effect before the Court, and that it is an injustice, that

persons who have by attorney subscribed the copartnership deed, and obtained profits in the colony, should now assert that they are not here but in England, and then demand to be actually summoned, seem plainly all based on the assumption, that these defendants are in truth in the position which it is the object of the *Scire Facias* to establish against them. The argument may be exhibited thus :—" You require no notice, to enable you to prove you are not a member, because you *are* a member." But the argument, so exhibited, is a palpable absurdity.

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In conclusion we will add, that at any rate the English practice dispensing with actual service, never could have been applicable in any of the Courts, to cases in which the defendant, as in this case, was at no time within their jurisdiction. Nor can we readily conceive, that the Rule of this Court adopting that practice, or introducing one intended as a substitute for it, was ever meant to be extended to such cases. If we assume the evidence before us to be true, these defendants were parties to the contract made by the Company, a contract made in this colony, and one therefore, on which—though never themselves personally—the defendants might justly be sued in the colony. If members of that company, carrying on business in this colony, the defendants might justly be regarded as constructively present. We might, even, for the sake of the argument, consider them in that case as, in effect, parties to the judgment. But we do not see how the objection can be overcome, that we are asked to conclude them to be members, and so to determine the case finally against them, on evidence which in fact they have never heard, and which there are no means assured to them, by law, of their ever having the opportunity of refuting. The law in these cases, it may be, is defective ; but it is not for us, in this place to supply the defect. Under our " Foreign Attachment " Act the property of absent debtors may be taken, whether they shall ever have been resident or not ; for a man may contract by agent, as well as in person. But the provisions of that Act do not extend, it appears, to writs of *Scire Facias*, and we cannot extend the remedy. Under that Act, indeed, ample protection is afforded to the absentee, against fraud or error of any kind, for security must be given by the plaintiff, and the judgment may afterwards be vacated, and costs and damages be summarily awarded against him. Here, however, no such check or safeguard would exist ; but the defendants, without actual notice, would be condemned for a contumacy of which they are innocent, upon an assumption, behind their backs, which may eventually turn out to be untrue.

Judgment set aside.

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REGINA v. M'INTOSH [No. I]. (1)

April 2.

Stephen C.J.
and
Therry J.

Jurisdiction—Sci. Fa. to repeal Crown Grant—Grant to a deceased person—
9 Geo. IV, c. 83, s. 11.

The Supreme Court has a Common Law jurisdiction to entertain a *Scire Facias* for the repeal of a Crown Grant, and the 9 Geo. IV, c. 83, s. 11, confers the same power.

A *Sci. Fa.* is not maintainable to repeal a Crown Grant to a person deceased before the issue thereof, the instrument being a nullity.

DEMURRER to a writ of *Sci. Fa.* This case was argued, Dec. 20, 1850, by *Broadhurst* (*Foster* and *Fisher* with him) for the defendant, and *Darvall* (with the *Solicitor-General*) for the Crown. The reserved judgment of the Court was delivered, April 2, by—

The CHIEF JUSTICE. This was a demurrer to a *Scire Facias*, issued to repeal a Crown Grant made to one *Robert M'Intosh*, of some land in the City of Sydney.

The writ recites that *Robert M'Intosh*, "formerly of Sydney, Musician," but now deceased, was in his lifetime the intended Grantee of the land ; and that, after his death, her Majesty "not being cognizant of the death of the said *Robert M'Intosh*, but intending to make a Grant of the Land in his favour, in fee-simple," caused Letters Patent to be issued under the Great Seal of this Colony, and to be duly entered of record and enrolled (which the Writ then sets out), granting the said Land "unto *Robert M'Intosh*, of Sydney." The Writ then states that after such issue and enrolment, the grant was improvidently delivered to *Robert M'Intosh* then, and at and before the date of the Letters Patent, a resident of Lane Cove" in this colony, at the latter's instance, and without any consideration, he claiming, but "falsely and fraudulently, to be the deceased's heir at law, and entitled to the Letters Patent, as a valid and subsisting Grant to himself." The *Scire Facias* alleges, on the contrary, that they are and ought to be void ; and that the same, and the enrolment thereof, ought to be repealed and cancelled, and restored into the Supreme Court for cancellation accordingly.

The Demurrer raises two objections to the Writ, first, that this Court has no jurisdiction to issue any *Scire Facias*, or entertain any other proceeding, for the repeal of a Crown Grant, and, secondly, that

(1) *The Sydney Morning Herald*, Dec. 21, 1850 ; April 3, 1851.

according to the statements in the Writ, the Grant was and is a mere nullity, and therefore that proceedings to repeal it are unnecessary and improper.

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The case was argued in the last Term, before Mr. Justice *Therry* and myself (Mr. Justice *Dickinson* taking no part in the discussion, or in this judgment), by Mr. *Broadhurst* for the defendant, and Mr. *Darvall* for the Crown. On the first point it was argued, by the former, that this Court has no other Common Law jurisdiction than such as is connected with its jurisdiction, than such as is connected with its jurisdiction in Equity; that the Lord Chancellor's powers, in respect of the cancellation of Grants, were incident to his custody of the Great Seal, and consequently the actual issue by him of such instruments; whereas, in this colony, the custody of the Public Seal was in the Governor. It was answered by Mr. *Darvall*, that the statute, 9 G. IV, c. 88, s. 11, gave this Court, in express terms, *all* the Common Law jurisdiction of the Chancellor; that the jurisdiction to cancel Crown grants was incident not to the issue, but the enrolment of them which appertained by law to the Supreme Court, and that, if this Court did not possess the jurisdiction, the Queen's subjects (for whose benefit, in fact, the writ of *Scire Facias* ordinarily issued) would be in cases of this kind without any remedy. On the second point, Mr. *Broadhurst* observed that there could be no conveyance, or valid grant, to a person not in being; and therefore, that the letters patent in this case were simply void, without cancellation, or proceeding of any other kind. To which Mr. *Darvall* replied, that the Crown had nevertheless the right, for the benefit of the true heir, and that it may give an unclouded title to the property, to have the instrument called in, that its existence, as an instrument apparently valid, enabled the possessor to commit frauds on the public, and that it ought therefore to be destroyed.

We have considered this case, and, on the question of jurisdiction, we are clearly in favour of the Crown. Independently of the express words of the 9 G. IV, c. 83, s. 11, which give to this Court the power to do all such acts, as can or may be done by the Lord Chancellor, in the exercise of his Common Law Jurisdiction, it seems clear that a *Scire Facias* may be brought in the Queen's Bench. *4 Inst. 72. Com. Dig. Patent F. 6.* If so, this Court clearly has the jurisdiction. The only ground for doubt, as to the *Chancery* jurisdiction in this case is, that the Lord Chancellor is said to possess the power to "hold plea of *Scire Fucias* to repeal Letters Patent, they being always enrolled in his Court (*4 Inst. 88 Com. Dig., Sci. Fa., C. 3*), but that, by our local Act

1851. of 7 Vic, No. 16, s. 8, Grants are in this Colony not enrolled anywhere. They are simply to be registered in an office created for that purpose, and it is omitted to be enacted that the Supreme Court shall retain its previous jurisdiction, notwithstanding that provision. We think, however, that the vested Common Law jurisdiction of the Lord Chancellor, howsoever derived originally, if at any time conferred on this Court, was not taken away by the mere cessation of enrolment. And we think that such jurisdiction (although the former part of the section, no doubt, refers only to this Court as a Court of Equity), *was* conferred on this Court by the 9 Geo. IV, c. 83, s. 11, because due effect could not otherwise be given to the enactment. The clause had already conferred every power necessary for the due execution of the Equitable jurisdiction; and the latter portion of the clause must, therefore, be taken to have contemplated the Common Law jurisdiction, ordinary and properly so called.

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On the second point taken by the Demurrer, we are of opinion with the defendant. It is true that, by the authorities cited from *Vin. Ab., Prerogative*, S. b., void Letters Patent would seem to be repealable, in some cases, by *Scire Facias*. There is no instance stated, however, like the one now before us. If the Crown grants a thing, it is said, and afterwards by Letters Patent grants the same to another party, these Letters are merely void; and yet the first patentee may have a *Scire Facias* against the second, to avoid the subsequent grant by judgment of the Court. There may be other instances, though this, so far as we can discover, is the only one mentioned in the books. A *Scire Facias*, however, to repeal a Grant made in error to a dead man, would seem to be an absurdity. The Writ is said to lie, where the Grant is contrary to law, or void for uncertainty, or for deception, or is unjust as it respects other persons (2). Now in the instance put, the second Grant must (constructively at least) have been obtained by deceit; and, at any rate, it was unjust. But, under what head could we range the present instrument? It was a thing not complete, in effect, at any time. As a Grant it never existed for one moment. The case is not, that the instrument as a Grant *operated nothing*, but that there never was, in legal contemplation, any such instrument to operate. It is hardly necessary to cite authorities, to show that there can be no Grant, without a grantee. How, then, can the thing be repealed?

Independently of this, we may observe (though the point was not taken, and it was unnecessary to take it), that no ground whatever

(2) See the cases in Ch. Prerog. 330.

appears in the Writ, other than the worthlessness of the instrument itself, for repealing it. No deceit is alleged (that is to say, as conducive to the making of the instrument), no fraud of any kind. The Crown, it is stated, caused the Letters Patent to be made to the deceased man, simply because it was not aware that he was deceased. The subsequent deceit and fraud, having reference merely to the delivery of the instrument, may be material in support of an Action of Detinue, or, possibly, a Suit in Equity, but not in a proceeding, which, as we conceive, can be sustained only in respect of a Crown grant, void or voidable, whereas the instrument in question, on the facts stated, was substantially no grant at all. In all the cases which we have found, of *scire facias* to repeal a grant, the defendant has been either the grantee, or his representative, or the actual *terre-tenant*. But the defendant is not alleged to be the last of these, and the very case made against him is, that he is neither of the two first. The writ seems to us, therefore, to be equally not sustainable, on principle or by precedent.

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Demurrer upheld.

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Ex parte M'CULLUM. (1)

June 11.
Stephen C.J.
Dickinson J.
and
Therry J.

Landlord and tenant—Tenements' Recovery Act, 11 Vic., No. 2—Notice—11 & 12 Vic., c. 43.

An appearance and adjudication under the Tenements Act, 11 Vic., No. 2, must be on the notice only, and the time and place are to be mentioned in it. The 11 & 12 Vic., c. 43, does not make good an adjudication by the Justices on complaint and summons, in a proceeding under the former Act, which does not relate to offences against the public.

THE reserved judgment of the Court in this case was delivered by—

THE CHIEF JUSTICE. The Prohibition in this case is sought, to restrain two of the Justices of Sydney from proceeding to eject a Tenant, under the Landlord's Act (commonly called Mr. *Brewster's*) of 11 Vic., No. 2. The case was argued before Mr. Justice *Therry* and myself, in the absence of Mr. Justice *Dickinson* on the Circuit, just before the commencement of the late vacation; and the following is Mr. Justice *Therry's* and my own judgment in the matter.

It appears by the affidavits, that the Landlord gave *M'Cullum* written notice, in the form prescribed by the Act, of his intention to apply to the Justices at Sydney, on a stated day and hour, to eject him, unless possession of the premises were previously delivered. At the time so named *M'Cullum* attended, and informed the Justices by his Attorney, that he was ready to proceed. The Landlord also was present. The Justices, however, conceiving probably that the Act so required, and that they had then no proper initiatory proceeding before them, declined to enter into the case upon the notice merely, and took the landlord's complaint in writing, to the effect that his tenant was unlawfully holding possession, and issued thereupon a summons to the latter, requiring his attendance to answer such complaint, at a future day, to which day they entered a memorandum that the case was adjourned. On the last mentioned day, *M'Cullum* (being advised, as he says that the Justices had no jurisdiction) did not attend; whereupon, after receiving proof of the service of the summons, the magistrate heard the case *ex parte*, and adjudicated against the defendant. It was contended by Mr. *Foster* for *M'Cullum*, that those proceedings were unauthorised, that the Act of Council, by the express terms of the schedule, and the

(1) *The Sydney Morning Herald*, April 17, May 8, June 12, 1851.

first section, intended that the time and place for the hearing should be appointed beforehand; and that although the matter might afterwards be adjourned, for good cause, yet it was the *notice* which originated, and which must support the adjudication; but that in this case there was no adjournment, except of the *complaint*—which itself was good for nothing, as the Tenant had already appeared pursuant to the notice, and was then entitled and ought to have been allowed to proceed. It was answered by the *Solicitor-General*, for the Landlord, that the adjudication was good as a proceeding by adjournment, or as one upon complaint and summons, the former of which was actually in the schedule, although not mentioned in the body of the Act, and the latter was authorised by one of *Sir John Jervis' Acts*, the 12 Vic., c. 43, sec. 1.

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We have considered this case, and we are of opinion, that the adjudication cannot be sustained. The local Act is so imperfectly drawn, that the Magistrates may well be excused for not having rightly construed it, but it appears to us, on mature reflection, that the appearance and adjudication must be on the notice only. The time and place are to be mentioned in it; which, on the Landlord's application, may always be a matter of arrangement by the Magistrates. The Act expressly requires, that the Tenant shall appear upon the notice, "at the time and place appointed." But, as the notice is to mention these, they must clearly have been appointed previously. He is then to show cause, why possession should not be given. If he had not then to enter into his case, the appointing of time and place would be idle. He would attend the Justices in vain. But, as the Landlord is then to apply for a warrant, and the Justices may then (he having had notice of the intended application) issue the same, upon proof of the service of the notice, *that* would conclusively seem to be the time for answering the application, or, in other words, for going into the matter on both sides.

It was conceded, that for good cause the Justices had power to adjourn the matter. But here there was no such adjournment. The case was not, in fact, upon the *notice*, gone into at all. There was a complaint made, and *that* was entered as adjourned, not the matter of the application for a warrant, in pursuance of the notice. Even the former, however, in strictness, was not adjourned, for the matter of it was never commenced. It was simply an initiatory complaint, followed by a summons, in the ordinary mode. Neither did the hearing, eventually, purport to be by adjournment.

The Magistrates were led into the difficulty, most probably, by the insertion of a form of complaint, which was followed in this case, in the

1851. schedule. But, although such a form is there given, there is no reference to it whatever in the body of the Act, nor is there anything said there about a complaint. How the form crept into the schedule, there, or why it was allowed to remain there, we are unable to comprehend.

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With respect to the power given to Justices, by *Sir John Jervis's* Summary Proceedings Act, to issue summonses and Warrants in certain cases, and in others to proceed upon Complaint, or without complaint, those provisions do not apply. This, it was truly said, is a case *sui generis*. The application to the Justices, is not to fine or otherwise punish. It relates to no offence against the public: It is for a warrant, to evict a tenant holding over without title, and the Justices have no other authority in the matter. The Landlord gives notice, that at a certain time he will apply; the Tenant is then to show cause, why no warrant should be granted; the Justices are then (or on some day of adjournment, having first *bond fide* entered on the matter of the application), to decide whether such warrant shall issue; and there the case will end. The 12 Vic., c. 43, has reference to cases of a very different kind, cases in which the defendant may be brought up, and either imprisoned or fined, or, at any rate, be the subject of some conviction or order, in reference to which his person may be dealt with.

The result is, that the writ applied for must go, and, in the meantime, all proceedings on the adjudication are hereby stayed.

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Jury—Challenge to the array—Traverse of the Sheriff's return—Deputy Sheriff, power to sign in his own name—Deputy's tenure of office—Jury Act, 11 Vic., No. 20, s. 15—42 Ed. III, c. 9—23 Hen. VI, c. 7.

April 23, 24.
Stephen C.J.
Dickinson J.
and
Therry J.

A challenge to the array is bad, which traverses the return filed by the Sheriff to the precept, ordering him to summon a jury.

By the 7 Vic., No. 13, the tenure of office of the Sheriff was made "during pleasure" instead of "from year to year," and he can now only appoint a Deputy during continuance of his office, or at will.

The statutes 42 Ed. III, c. 9, and 23 Hen. VI, c. 7, are not in force in the colony.

The Deputy Sheriff may sign a Jury Summons in his own name.

SPECIAL CASE upon a point reserved at the trial of the defendant, before His Honor the *Chief Justice*, at the last criminal sittings of the Supreme Court. A special jury was summoned to try the defendant, and all the summonses were signed "*C. Prout, Under Sheriff.*" As soon as a full panel of the Jury were called, the defendant's counsel handed in a challenge to the array, alleging that the jury had not been summoned by summons in writing signed by the Sheriff or his deputy. When the challenge was filed the counsel for the prosecution moved that the precept to the Sheriff and his return be filed and read, which return was in these words—"In obedience to the within precept, I have caused to be summoned thereupon, in pursuance of the Act in that behalf, the jurors whose names are in the panel hereunto annexed."

The counsel for the prosecution then moved that the challenge be quashed. His Honor refused the application, and called upon him to plead or demur. The prosecuting counsel then pleaded that the jurors were duly summoned according to law. To this plea the defendant's counsel demurred on the ground that the plea was insufficient, as not specifically denying the allegations of the challenge. The prosecutor joined issue on this demurrer, and in addition an exception was taken for the Crown, that the challenge itself was insufficient in law.

After hearing the counsel for the defendant, His Honor held that the challenge was insufficient, as in point of law he thought it immaterial to the question of trial, whether the jurors had all been summoned by notice in writing or not.

(1) *The Sydney Morning Herald*, April 26 & 29, 1851.

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The question now was whether the challenge was on the demurrer sustainable or not.

Purefoy, Holroyd, and Meymott, for the defendant. The jury were not summoned in conformity with the 15th section of the Jury Act.

[*Dickinson, J.* The Sheriff having said one thing, can you say another? The question is, can you by a challenge to the array contradict the Sheriff's return?]

It is submitted the return can be traversed, *O'Connell's case* (2), and *Hoare v. Broom* (3). A *venire de novo* should be granted. Greater care should be taken in criminal than in civil cases.

Foster, Broadhurst, and Darvall, for the Crown, admitted the difference between civil and criminal proceedings. In misdemeanours a defendant must assign cause of challenge; but not so in felony. Misdemeanours are looked on as civil cases. *In favorem vite* the Sheriff's return is not conclusive. *Watson on Sheriffs*, p. 72. The defendant should have moved to quash the return. *Rex v. Edmonds* (4), and *Rex v. Hunt* (5), show that a juror not having been properly summoned will not invalidate the panel.

DICKINSON, J. As this case comes before the Court by way of appeal from a decision of his Honor the *Chief Justice*, he thinks I should give judgment first. It appears that there was an information for libel filed against the defendant. After the case was called, a full jury was returned by the Sheriff. The defendant then challenged the array, to the effect that the jury were not properly summoned. The prosecutor pleaded to the challenge that the jury were summoned according to law, and which plea was demurred to. The demurrer was properly conceived and properly ruled in favour of the defendant. His Honor delivered judgment in favour of the defendant on the demurrer to the plea, but the judge was bound to look retrospectively, and see if the challenge was sustainable. The *Chief Justice*, after examining the challenge, gave judgment against the challenge, because the point was not contestible in that form. The precept is part of the Act, and there is a precept in pursuance of the Act, and the precept says to the Sheriff, "you are to cause to come," and the Sheriff says he has caused to be summoned. This return of the Sheriff is in substance precisely within the wording of the enactment. *Chambers v. Bernasconi* (6) shows that what is meant by a sheriff's return is a sheriff's account of what he has done in

(2) 11 Cl. & Fin. 155. (3) 1 Cro. (Eliz.) 369. (4) 4 B. & Ald. 482.
(5) 4 B. & Ald. 431. (6) 1 Cr. M. & R. 347.

pursuance of his duty. And in the present case the Sheriff says he has summoned the jurors in pursuance of the Act. The defendant challenged the array, and the words of the challenge directly contradict the Sheriff's return. The challenge is substantially a contradiction of the Sheriff's return. The *Chief Justice* overruled the challenge, and I think he was right in doing so. In *O'Connell's case* (2) the Recorder had not found the proper materials for the Sheriff from which to make his return. The fault was with the Recorder, and the Sheriff's return was not impugned. The present case is distinguishable from *Gillespie v. Cummings*, and the *Bank case*, because in both those cases issue was joined on the challenge. There are two distinct authorities in *Bacon's Abridgment* to show that a challenge to the array cannot contradict the return. A sheriff is a public officer, and has public duties to perform, amongst others with the return of precepts, and where he does a duty he is presumed to be entrusted with the power of doing so. *Hoare v. Broom* (3), and *the Sheriff of —*, in *Ventris' Reports*. It was argued that the cases cited for the defendant were civil cases, and that the present was a criminal case. The rules of pleading, however, are substantially the same in all the courts. Under all the circumstances, his Honor the *Chief Justice* most properly overruled the challenge because the challenge contravened the Sheriff's return.

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THERY, J. I am of the same opinion, for the reasons stated by Mr. Justice *Dickinson*. The cases cited by his Honor have completely established this fact, that a challenge to the array cannot contradict the Sheriff's return. I see no distinction in the challenges to the array between a civil and criminal case; I think the same rule applies to both. *O'Connell's case* (2) is not applicable to the present case; the act of the Sheriff was not called into question.

THE CHIEF JUSTICE. I expressed my opinion at the trial. I need only now add, I concur with Mr. Justice *Dickinson* and Mr. Justice *Therry*, that the challenge to the array was a direct contradiction of the Sheriff's return.

Ruling below upheld.

Purefoy then moved, on affidavit, for a rule *nisi* for a new trial on three grounds, of which the two following only were afterwards relied on: that the jury had been improperly summoned, the summons to each juror having been signed "*C. Prout, Under Sheriff*," instead of, as the Act required, by the Sheriff or his Deputy; and that His Honor refused to allow the defendant to challenge the poll the first juror on the list.

.1851. The Court granted the rule, and

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Foster, for the Crown, stated he was ready to show cause at once. He afterwards insisted upon his right.

The Court allowed him to proceed.

Foster, *Broadhurst*, and *Darvall* then showed cause. The Court will see whether there has been any obstruction of justice. *Rex v. Edmunds* (8) is in point. It was not shown that any juror was summoned from favour. Mr. *Prout* had full power to sign in his own name, as well as the name of the Sheriff.

[The CHIEF JUSTICE. The test is, that supposing Dr. *Lang* had been acquitted, would the Attorney-General be entitled to a new trial on this point?]

The Sheriff authorizes Mr. *Prout* to do all he can do himself. The Under Sheriff has power to summons, unless the power be limited, *Lecke v. Howell* (9).

Purefoy, *Holroyd*, and *Meymott* for the defendant. No such person as the Under Sheriff is known to the Common Law. 7 *Bac. Abr.*, 182.

[The CHIEF JUSTICE. All the authorities in England show that an Under Sheriff can only do acts in the name of the Sheriff, but what we want to see is, what the powers of the Under Sheriff are in this Colony? Though the Sheriff only gives power to the Under Sheriff to sign his name, does not the statute give him a power to sign processes equally with the Sheriff?]

The 11 Vic., No. 20, s. 15, does not give to the Deputy Sheriff any power to sign process. "Signed by the Sheriff or his deputy" means that the deputy can only sign in the name of the Sheriff. *Duvarris*, 641. The Under Sheriff is not an officer of the Court. Mr. *Prout* was appointed by the Governor, not by the Sheriff, as required by the Charter of Justice. But if he was appointed by the Sheriff, his appointment has lapsed by effluxion of time. By the Charter the appointment of Sheriff is limited to a year, and he could not appoint his deputy for a longer time than he held office. The Statutes 42 Ed. III, c. 9, and 23 Hen. VI, c. 7, are part of the law of the Colony by 9 Geo. IV, c. 83, s. 24, and enact that the Deputy Sheriff shall only be appointed for a year. Mr. *Prout's* appointment from Mr. *Gilbert Elliott*, the present Sheriff, being dated the 1st December, 1849, expired on the 1st December, 1850.

(8) 4 B. & Ald. 473.

(9) 1 Cro. (Eliz.) 533.

[DICKINSON, J. Taking the Jury Act and the schedule together, under certain circumstances the Deputy Sheriff is invested with the power of the Sheriff. Assuming that the summonses, being signed by the Under Sheriff, be good, is the return to the precept good, being signed by the Sheriff?]

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Foster and Darvall. The summons must be looked upon as the act of the Sheriff; but the Act enables the Deputy Sheriff to do in his own name what may be done in the Sheriff's name. Either may sign the summons, but the Sheriff, by the 16th section of the Jury Act, must return it.

[DICKINSON, J. Taking the different sections of the Jury Act together, must not the Sheriff and Deputy Sheriff be taken to act as principal officers; by sections 12, 13, and 14, must not the person who does one do all?]

The Court called on counsel for the Crown for further argument as to the statutes of Ed. III, and Hen. VI, being in force in the Colony. Before argument, *Chief Justice* stated that there were some inaccuracies in the affidavit upon which the rule had been granted, as to what took place in challenging a juror at the trial. The statement that "When the first of the jurors to try the defendant was called, the said defendant by his counsel challenged the said juror, for not having been duly summoned," was inaccurate. When the panel was being reduced, without the calling of any name whatever, the defendant's counsel said he objected to the persons (or some particular person) *on that List*, for the cause stated. If the objection was bad in respect of *all* the jurors, it must equally be bad as it respected each individual juror. On that account his Honor refused to receive the objection.

Foster (and Darvall). The Sheriff, under the Acts of Council of the Colony, is here an officer of the Court, and more like an Elizor of the Court as mentioned by *Coke*. The Sheriff here is Sheriff so far as performing the *legal* duties of the office are concerned. In England the Under Sheriff is put out when they put the Sheriff out; this is to prevent dishonest practices. The Sheriff here is as much an officer of the Court as the Master in Equity. If the statutes of Ed. III and Hen. VI were in force, what necessity was there to insert in the Charter of Justice a provision for the appointment of sheriffs?

Purefoy, Holroyd, and Meymott, contra.

The CHIEF JUSTICE. We are all agreed upon the questions which have been raised. I thought at first that the objection to the appointment of the Under Sheriff was a good objection. After paying the

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greatest attention to the argument, I am now of opinion that the objection is not sustainable. The law is this: A charter was issued which says that the Governor shall annually appoint a Sheriff, and the same person might be appointed from year to year. The tenure of office of the Sheriff here is essentially different to the tenure of office of the Sheriff in England. The same Sheriff may be appointed in this colony from year to year, but not so in England. The duties of the Sheriff in England are also different from the duties of the Sheriff in this colony. The charter is confirmed by the 9 Geo. IV, c. 83, s. 24. The Sheriff may by the common law execute all processes by his deputy. The Charter goes on to say, not that the Sheriff shall appoint a deputy, but that he may go out as he may think fit. When the Sheriff's appointment was from year to year, he could only appoint a deputy for that time, or for less than a year. The Sheriff's appointment being limited to one year, he could not appoint beyond a year. By the Charter of Justice the Sheriff shall continue in his office during the space of one whole year, and until another shall be appointed, and sworn in, and the deputy is to be appointed by the Sheriff and his successors during his or their continuance in such office. An act was afterwards passed, the 7 Vic., No. 13, which altered the tenure of the office of the sheriff from year to year "during pleasure." As, therefore, the Sheriff now holds his office during pleasure, he cannot appoint a deputy for a year, but he can only appoint a deputy at will, or during the continuance of the Sheriff's office. The Sheriff and Deputy Sheriff have, since the passing of this Act, held their office on co-ordinate tenure. I am disposed to think that the English statutes of Edward III, and Henry VI do not apply to this colony. In a young colony a gentleman could not be found to undertake the duties of Sheriff. I am clearly of opinion that an Under-Sheriff in this colony may be appointed for more than one year. A Sheriff in England may hold his office in some cases for more than a year, or for life, although these are the exceptions. If the Sheriff holds the office without annual renewal, but during pleasure, he is within the exceptions of the statute of Henry VI, in holding the office as if for life. The Deputy-Sheriff may hold his office co-ordinate with the Sheriff, and when the Sheriff goes out of office he must go out too. The appointment of Mr. *Proul* is that of Under-Sheriff and deputy too, as he is deputed by the Sheriff to do certain acts which the Sheriff ought to do. Under this power he ought to have signed the summons in the Sheriff's name, but then the Jury Act gives him power to sign a summons in his own name, and the form shall be to the effect in the schedule to the Act, and as the words are "to the effect," the Under-Sheriff can sign in his own name.

The 12th, 13th, 14th, 15th, and 16th sections are not consistent with each other. The Jury Act is badly worded, and the word deputy ought never to have been used. Though the Act says the Sheriff is to issue the summons, it is clear that the Sheriff or his deputy may sign it. By the 16th section, the Sheriff or his deputy is to return the jury procept into the Court. The form of the precept is to the Sheriff or his deputy, and if the deputy summon he should sign the summons, and I think the Sheriff may make the return notwithstanding the Deputy-Sheriff has signed the summons. The Sheriff has returned the precept, and it is signed in his name. We are here to decide upon points according to law, and if we had found that the statutes of Edward III and Henry VI were in force here, we should have been compelled to have decided so, notwithstanding the inconvenience which might arise from such decision.

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DICKINSON, J. I have no doubt whatever that the Under-Sheriff's appointment made by Mr. *Elliot* is valid ; the Under-Sheriff's tenure of office is not limited to one year. By the Charter of Justice the Sheriff might be Sheriff for more than one year, or for one year only. The Charter does not only say that the Sheriff shall be appointed for one year only, but also until his successor shall be appointed, and therefore the Deputy-Sheriff can hold office so long as the Sheriff holds office, even though for more than a year. Then, are the statutes 42 Edward III and 23 Henry VI applicable to this colony ? The mode of declaring the applicability of English laws to this colony is provided for by the 9th Geo. IV, c. 83, s. 24. Twelve months ago I gave this opinion : " On consideration of the statute 9 Geo. IV, c. 83, 24, I think this Court can only declare such portions of English law applicable to this colony as the colonial legislature would declare to be applicable by ordinances to be by them for that purpose made." And the reason I now assign is, that otherwise the Court and Legislature might make different declarations as to the applicability of an English statute, and so there would be a conflict of jurisdiction. Considering that the office of Sheriff here is so essentially different to the office of Sheriff at home, it has been considered by the colonial legislature that such old laws are inapplicable to this colony. The law of England has declared that where the Sheriff is appointed for one year, the deputy's appointment is co-existent with the Sheriff's. But as the Legislature has made the office of Sheriff tenable during pleasure, the office of deputy can be held for the same period. Neither is there anything in the charter to limit the appointment of the Deputy-Sheriff. We adjudge that those old statutes are not in force here. The Under-Sheriff is nothing more than the Sheriff's deputy :

1851. *Watson on Sheriff*, 28. I am of opinion that the counsel for the Crown
 REGINA have brought sufficient evidence to show that Mr. *Proust's* appointment
 v. is good and valid. The summons was signed *C. Proust*, Under-Sheriff.
 LANG. The question is, whether or not this summons is good?—and I am of
 Stephen C.J. opinion that it is good. I think the objections untenable, and that there
 should be no new trial.

TERRY, J. The grounds have been so fully stated by the other Judges, why these objections should be overruled, that I have very little to add. The return of the precept may be signed by the Sheriff adopting the act of his agent, or the Deputy-Sheriff may sign in the name of the Sheriff. There is nothing in the Charter of Justice to prevent the Sheriff being in office for several years in succession; and this has been the practice in this colony. Though the appointment was formerly an annual appointment, there was, in fact a perpetual continuance of the Sheriff in office; and I see nothing to vitiate the appointment of the Deputy-Sheriff, even if the Deputy-Sheriff had been appointed by the Sheriff to be Deputy-Sheriff during his (the Sheriff's) continuance in office. I concur in the opinion expressed by the Court, and especially by Mr. Justice *Dickinson*, about the inapplicability of the old English Acts. I am of opinion that they are not applicable here. The old statutes apply to an annual office, and make the office of Deputy-Sheriff co-extensive with the office of Sheriff; but here there is a different state of things, the office of Sheriff is not an annual office, but is tenable during pleasure. The part of the statute which has the nearest analogy to the office in this colony is contained in the excepting part of the Statute of Henry VI. Upon both grounds I fully concur with the decision expressed by the other members of the Court.

New trial refused.

HOLT v. ABBOTT AND ANOTHER. (1)

1851.

54 Geo. III, c. 15, s. 4—*Liability of heir for ancestor's debts*—"Subjects" of the Crown—"Indebtedness" of maker of bill of exchange—*Alien suitor*.

Sept. 10.

Stephen C.J.
Dickinson J.
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In every case where a person's executor or administrator might be sued, in respect of the personal estate, then his heir-at-law may be sued, under 54 Geo. III, c. 15, s. 4, and in the same form of action, in respect of the real estate.

Every person who sues in the Queen's Courts, in the absence of evidence to the contrary, is reasonably presumed to be her subject; if born an alien, and neither naturalized nor become a denizen, yet if he owe local allegiance, he is a subject.

The drawer of a bill undertakes that a drawee shall honor it, and if he die before presentment, the liability is transferred to his representatives, and here, by 54 Geo. III, c. 15, the holder may sue either the executor or the heir.

THE judgment of the Court was delivered by—

THE CHIEF JUSTICE. Assumpsit against husband and wife, the latter being the heiress of one *William Challenger*, upon a Bill of Exchange drawn by him "in parts beyond the seas, to wit, at London," at ninety days after sight, upon a person resident in Sydney, by whom, on presentment to him for acceptance, it was dishonored, the drawer having previously departed this life intestate. Averment, to excuse the giving of notice of such dishonor, that *Challenger* had no effects in the drawer's hands, and had given no consideration for the acceptance or payment of the bill; and that the defendants hence sustained no damage by the non-receipt of notice. Promise by the wife, as heiress, before her marriage, in consideration of the premises, to pay the bill "according to the tenor and effect thereof, and of the said dishonor, on request." To this the defendants demurred, generally, the objection noted being that there is not sufficient consideration shown for the alleged promise.

On the argument of Mr. *Meymott*, however, several points were taken, not embraced, apparently, by the marginal notation, nor as we think, with respect to one exception, within the scope of a general demurrer. This last was, that the promise alleged was clearly unsustainable, as there could be no liability to pay "on request," and "according to the tenor of the bill," that is to say, at a specified and ascertained time after presentment. And, as to this, we are agreed that the promise, as alleged, is informal and inconsistent, and, indeed, strictly taken, insensible. For there could be no promise, to pay according to the tenor of the *dishonor*; nor, on request, and also at a subsequent fixed period. But these,

(1) *The Sydney Morning Herald*, July 26, 31; Sept. 11, 1851.

1851. we clearly conceive, are all matters for a special demurrer only. Looking
 HOLT at the *substance*, the true reading appears to us to be, that the promise
 ?
 ABBOTT. alleged is, to pay on request, "according to the effect of the bill, and
 Stephen C.J. its dishonor," that is to say, an acceptance of the bill being required,
 and such acceptance being refused, the liability of the drawer (or his
 representative) thereupon, was, to pay immediately, in other words, on
 request.

The liability of the heiress, in this case, if there be any at all, is by force of the statute 54 Geo. III, c. 15, s. 4, by which real estate in this Colony, "belonging to any person indebted," is made liable to and chargeable with "all just debts, duties, and demands, of what nature or kind soever, owing by such person to His Majesty, or any of his subjects," in like manner as real estate is, by the law of England, liable to the satisfaction of debts by specialty. The argument for the plaintiff was, accordingly, in substance this, that if this demand be one which, in its nature, could be enforced against the executor or administrator of *Challenger*, in respect of the personalty, if any, it is one which must necessarily be equally enforceable, in respect of *Challenger's* real estate, against his heir or heiress-at-law, it being the clear intent and meaning of the statute that all debts and demands should, in this colony be upon an equal footing, so far, at least, as to make the heir liable, in respect of simple contract debts, as fully as he is in respect of debts by specialty. And for this our judgment in *the Bank of Australasia v. Murray*, in October last (2), was relied on as a conclusive authority.

On the other hand, it was objected that, nevertheless, no consideration appeared for a promise by the heir, first, because *Challenger* was not a person *indebted*, nor was there at the time of his death a *debt*, within the terms of the statute; secondly, that it did not appear that the plaintiff was, within the terms of the statute, a *subject of the Queen*; thirdly, that it nowhere appeared that the defendant, the heiress of *Challenger*, was sued *in respect of real estate*, none having been alleged to have descended to her. It was contended that, as against the heir, the existence of a debt could not be inferred, because of the mere drawing of the bill; that the happening of the ancestor's death before presentment of that bill cancelled the drawee's authority to accept; and that so no liability was cast on the heir, or at any rate, there was no implied promise on the part of the heir to pay by reason of the drawee's default to accept, under such circumstances. It was insisted, moreover, that, in any event, the plaintiff's remedy, if he had one, was in Equity.

We have fully considered these arguments, and we are of opinion that the demurrer must be disallowed. With regard to the specific objections, we conceive, as to the second, that every person who sues in the Queen's courts, in the absence of evidence to the contrary, is reasonably presumed to be her subject. If born an alien, and neither naturalised nor become a denizen, yet, if he owe local allegiance, he is a subject. Next, as to real estate descended. The female defendant here is sued as heiress, and in no conceivable way can she be liable as such, unless in respect of real estate. If, therefore, none has descended to her, she will plead that fact. Had she been sued on her ancestor's bond, or other specialty, no allegation would have been necessary that real estate had come to her hands; and why should the allegation be necessary when, by virtue of the statute, she is sued on his simple contract?

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Then, as to the objection that *Challenger* did not die *indebted*. It cannot be maintained, we apprehend, that on the facts of this case, no action would have lain against *Challenger's* personal representative. If so, a man drawing a bill for which he then receives value, who should die before presentment, would transmit no liability whatever to pay it, a conclusion which would be repugnant to common sense. But the drawer of a bill, by the custom of merchants, undertakes that the drawee shall honor it, and if that contract be broken, the law thereupon raises an implied promise, that he (the drawer) will immediately pay it himself. Each of these liabilities descends, as a matter of course, in case of the drawer's death, upon those who represent him; and it follows that, on the happening of the breach, the law transfers the implied promise to the executor. Let it then be supposed that such a contract and promise were respectively under seal, in terms expressly binding, not the drawer's executor only, but his heir. In that case, the holder of the bill would be entitled, by compact, to sue either; and here the holder has the same right by statutory enactment.

The statute does not use the word "debts" only, but makes the heir liable (or, in other words, the real estate in his hands) in respect of all debts *and demands*—adding "of whatever nature or kind." We cannot reasonably give the enactment, therefore, any other construction than this—that a person "indebted" means one against whom there was, at the time of his death, a debt, or demand in the nature of a debt. And our conclusion is that, in every case where such a person's executor or administrator might be sued in respect of the personal estate, there his heir-at-law may be sued, under this enactment, in respect of the real estate.

Demurrer overruled.

1851.

REGINA v. M'INTOSH [No. II]. (1)

Sept. 10.

Stephen C.J.
and
Therry J.

Crown Grant, issue of, procured by fraud—Personation of grantee—Void and voidable.

The Crown, intending to grant certain land to one M, was induced by another person of the same name, after M's death, to deliver the grant to him by representing himself to be the promisee. *Held*, the grant was not void, but voidable.

DEMURRER to a writ of *Scire Facias*. Argued by *Broadhurst* for the defendant, and the *Solicitor-General* for the Crown, Aug. 1. The judgment of the Court was delivered, Sept. 10, by—

The CHIEF JUSTICE. This is a case of a Demurrer to the 3rd count of a declaration in *Scire Facias*, issued to repeal a Grant of Land for alleged misrepresentation.

The 1st count alleged, that one *Robert M'Intosh* (then of Sydney, Musician, but since deceased) was entitled to a Grant of the Land in question, and had applied accordingly for the same: and that the Crown, intending to make a Grant of the land to him, and not being aware of his death, issued one to "*Robert M'Intosh*, of Sydney," but that the said Grant, after its enrolment, was improvidently delivered to the defendant *Robert M'Intosh*, "of Lane Cove, in the County of Cumberland." That Count was demurred to, on the ground (among others) that no Grant, issued under the circumstances stated, could have any operation whatever; and, therefore, that a *Scire Facias* to repeal it was superfluous and idle. On that ground, we sustained the demurrer, holding that, on the facts of the said 1st Count, the Grant appeared to have been to a dead man, so that there was no grantee to take, and, therefore, there was no operative grant to anyone (2).

The present demurrer seeks to place the 3rd count in the same category. The count states that the deceased *Robert M'Intosh* was entitled, and had applied, as alleged, in the 1st count; and then, that the defendant *Robert M'Intosh* represented himself, after the former's death, to be the same individual as the applicant, whereupon the Crown, believing that representation to be true, caused Letters Patent to be issued, *whereby the land was granted to the said defendant, in accordance*

(1) *The Sydney Morning Herald*, Aug. 2, Sept. 11, 1851.

(2) *Ante*, p. 680, April 2, 1851.

with his application. It was submitted by Mr. *Broadhurst*, that a Grant issued under those circumstances was void, just as much as if the defendant's name had not, as here, happened to be identical with that of the intended grantee, for that the plain intention of the Crown was, to grant to *Robert M'Intosh the elder*, or, at any rate, to a different person from the *younger M'Intosh*, the defendant, who dishonestly obtained possession of the instrument, so that (as he contended) there was in effect no grantee at all. To this it was answered by the *Solicitor-General*, that a practised deception did not make a grant void, but rendered it voidable only, and that here the Crown (on the facts stated) intentionally granted to the defendant, because on his representation, it believed him to be another person.

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The demurrer was argued before Mr. Justice *Therry* and myself, in the absence of Mr. Justice *Dickinson*, and I then was and still am of opinion, that the third count is not open to the objection taken. It appears to me that the case is exactly as the *Solicitor-General* put it. The Crown, misled by a representation that he was *Robert M'Intosh*, the elder, deliberately and intentionally granted the land to the defendant. If he had borne another name, or he had not, in any sufficient degree, answered the description in the Grant, there might have been some difficulty. But a *deceased* man could not have been intended; that is quite clear. And the name and description, at the time, coincided with those of the defendant. On the facts stated in the first Count, there was no grantee at all. Here, however, there is a grantee; for the defendant, by a successful personation, procured himself to be made so, and he became so, by his true name, and by an apt or sufficient description.

Mr. Justice *Therry* was, at first, inclined to sustain the demurrer, but on further consideration, His Honor agrees in opinion with me that this case is distinguishable from the former one, and that, on this demurrer, the Crown is entitled to our judgment.

With respect to costs, we see no sufficient reason for depriving the Crown of them. But, as the defendant has succeeded, on the issues raised on the other Counts, the costs of this demurrer will be deducted from the amount payable on those issues. The defendant also, should he desire it, will be let in to plead, on such terms as a Judge in Chambers may think proper.

Order accordingly.

1851.

ATTORNEY-GENERAL v. RYAN AND OTHERS [No. I]. (1)

Sept. 17.

Stephen C.J.
Dickinson J.
and
Therry J.

Information of Intrusion—Description—Presumption of continuance of estate of former grantee.

In an Information of Intrusion the land was described as having been "granted in accordance with the Reports, &c.," in addition to the ordinary description of the abuttals. A Demurrer to this was held good on the ground that there was a presumption that the title in the grantee still existed, the Crown not having shown that the estate had determined.

DEMURRER to Information of Intrusion. The case was heard, August 1, *Broadhurst* appearing for the defendant, and the *Solicitor-General* for the Crown. The reserved judgment of the Court was delivered, September 17, by—

The CHIEF JUSTICE. This is an Information of Intrusion in respect of certain land in Sydney. The information, instead of describing the land by its abuttals simply, adds a further description, showing that the land has been, at some former time, *granted* by the Crown (to whom does not appear) in accordance with a Report from the Commissioners for Grants. The words are, "being the land granted in accordance with the Reports, on Memorials 538 and 906, by the Commissioners appointed under the Act of 4 William IV, No. 9." One of the defendants, therefore, has demurred specially to the information, assigning, for cause (among many other grounds, which were all disposed of on the argument) that *prima facie* the title was not in the Crown, but in some grantee from the Crown, or that there was at least an ambiguity, occasioned by the added words, whether the title was in the Crown or a subject.

The *Solicitor-General* insisted, however, that the whole was but matter of description, by which, he maintained, no question as to the title could arise. He contended, that sustaining the Demurrer would be, in effect, to compel the Crown to set out its title, and that the allegation that the land *now* belonged to the Crown was sufficient.

We have considered this question, and we are of opinion that the demurrer must be allowed. The Crown, on its own showing, has issued a grant of the land, under a recent Act of Council, of which we are

(1) *The Sydney Morning Herald*, August 2, September 19, 1851.

bound to take notice, passed in aid of persons claiming to be entitled to such grants. According to the well known presumption of continuance, therefore, the title in the grantee still exists, and the Crown consequently should have shown that the estate has been determined. At any rate, there is an ambiguity. The Information alleges, no doubt, that the land belongs to the Crown; but, if so, what becomes of the grant?

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The Attorney-General may amend; but we think that it must be on the usual terms.

Order accordingly.

[IN EQUITY.]

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EALES v. NOWLAND AND ANOTHER. (1)

Sept. 10.
Stephen C.J.
and
Therry J.

Impounding—Undertaking to pay damages—4 Will. IV, No. 3—disputed station boundaries.

Respondent having impounded complainant's sheep, an undertaking to pay damages was given, under 4 Will IV., No. 3, to release them. A summons for illegal impounding was afterwards dismissed by justices, on the ground that the case was one of disputed boundaries.

The respondent was ordered by the Full Court to take no proceedings on the undertaking, pending the prosecution of an action of trespass by the complainant within a certain time, and in the event of his failure in the action, the order to be discharged.

ON June 25, a rule in this case was obtained by Mr. *Fisher*, under the Law Simplifying Act (2), calling upon the respondents to show cause why two undertakings, given by *Charles Humphreys* (acting for and on behalf of the complainant) to the respondent, *Elford*, for the payment of the sum of £115 5s. 8d. for damages and charges on the impounding by the respondent, *Nowland*, of certain sheep belonging to the complainant, in February, 1851, should not be delivered up to be cancelled, and for an injunction to restrain the respondents from taking any proceedings for the purpose of enforcing the same. It appeared from the affidavit of the complainant, upon which the rule was obtained, that he had been the occupier of a station on Liverpool Plains, called Walhalla, since 1842, and that, since that year, respondent, *Nowland*, had occupied some land adjoining. There were disputes between the parties which are still pending. In February last, the respondents, with some other persons, drove 11,000 or 12,000 sheep belonging to the complainant off the run, and impounded them at the public pound at Mooki. The complainant's superintendent, after an ineffectual attempt at rescue of the sheep, entered into the undertaking required by the Act of Council, 4 Will. IV, No. 3, to pay a certain sum for damages within one month. It was sworn that the undertaking was given to save the sheep from starvation. A similar act was shown to have been committed in the same month, and a similar undertaking given. A summons for the

(1) *The Sydney Morning Herald*, September 11, 1851.

(2) 12 Vic., No. 1.

illegal impounding had been taken out before the Tamworth Bench, but the magistrates dismissed the case on the ground that it was a case of disputed boundaries. It was sworn that application was about to be made for process of distress, upon the undertaking given by the superintendent, whence the present application.

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Fisher moved that the rule be made absolute.

Broadhurst showed cause, upon an affidavit of the respondent, *Nowland*, in which he denied the material facts relied upon by the complainant, and cited *Skeate v. Beale* (3), and *Lindon v. Hooper* (4).

The COURT stated that they had no doubt as to the complainant's right to support the rule upon equitable principles, and made an order to the effect that the complainant should, within a certain time and upon certain specified terms, bring an action for trespass against the respondent, *Nowland*, for the purpose of fixing the right to the run mentioned in the affidavits, and that, in the event of his failing in such action, or not fulfilling the terms of the order, the rule should be discharged with costs.

Order accordingly.

(3) 11 A. and E. 983.

(4) 1 Cowp. 414.

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DARBY v. REID. (1)

Oct. 20.

Stephen C.J.
 Dickinson J.
 and
 Therry J.

Slander—11 Vic., No. 13, s. 2—*Evidence*—*Defendant's statements*—*Intention*.

When the jury has found in an action for slander that the words complained of were not calculated to do an injury, the Court is not prevented by sec. 2 of 11 Vic., No. 13, from exercising control over the verdict, and directing a new trial on the ground that the verdict was against evidence.

Evidence of defendant's statements are admissible to show with what intention the slander was uttered. (*Pearson v. Lemaitré* (2) followed.)

NEW trial motion. This was an action of slander, tried before His Honor Mr. Justice Dickinson, in which a verdict had been returned for the defendant. The slanderous words spoken of the plaintiff by the defendant were "liar and scoundrel." These were found by the jury to have been spoken, but, under sec. 2 of 11 Vic., No. 13, that the plaintiff was not likely to be injured by them.

Darvall, for the plaintiff. The defendant was a gentleman of wealth and influence in Newcastle, and the plaintiff a schoolmaster. The slanderous expressions were used by the defendant, whilst going up and down by coach from Newcastle to Maitland, and he always coupled his remarks with this, that he would ruin the plaintiff. This evidence, refused at the trial, should have been admitted. *Newton v. Holford*, (3); *Pearson v. Lemaitré*, (2); *Barwell v. Adkins*, (4). Evidence is admissible to show *quo animo* the libel was, though the libel declared on is free from ambiguity. Damages will be presumed if the words are libellous. (He was stopped.)

The *Attorney-General* and *Purefoy* showed cause. The Court will not interfere with the power of the Jury under the 2nd section of the Act.

The CHIEF JUSTICE. Does the section mean that the Court cannot exercise a control over the verdict of the Jury?

The Court cannot interfere with the decision of the Jury. Proof of the special damage set out in the declaration failed.

Darvall. The evidence rejected must have had weight with the Jury. The occasions on which the slander was repeated were so numerous,

(1) *The Sydney Morning Herald*, Oct. 21, 1851. (2) 6 Scott N.R. 607; 5 M. & Gr. 700. (3) 1 Car. & Kir. 537. (4) 1 M. & Gr. 807.

that it must have satisfied them that the object of the defendant was to injure the plaintiff. No proof of special damage is required, if the words are spoken of the plaintiff in the way of his business as a schoolmaster, and it is so laid in the declaration.

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THE CHIEF JUSTICE. We are all of opinion that this case should undergo a second investigation. The words "liar and scoundrel," applied by the defendant to the plaintiff, affected plaintiff's character as a schoolmaster, and his morals as a man. The Jury have found that the words were spoken, but that, under the 2nd section, the plaintiff was not likely to be injured by them. The law, however, implies malice, and the plaintiff would be entitled to damages except for this section. The Jury found that the plaintiff would not be injured, without any evidence before them to warrant such finding. The words impeached the plaintiff's veracity, and being spoken publicly, must be presumed to have been spoken to injure him. The trial must be looked upon as a conclusion drawn without evidence. I think the plaintiff is entitled to a new trial. On the authority of *Pearson v. Lemaitré* (5), I think that a new trial ought to be granted because the evidence was improperly rejected.

DICKINSON, J. I am of the same opinion. The words were spoken so publicly, and on such occasions, that I think they were calculated to injure the character of the plaintiff, and that the Jury came to a conclusion without evidence.

TERRY, J. I concur in the judgment of the Court, that this case should be investigated again, as the verdict appears to me to be against the weight of evidence, but not altogether against evidence. I think the Jury, in a case like the present, ought to take into consideration all the surrounding circumstances, for instance, that the defendant charged the plaintiff with having committed a breach of faith. A *prima facie* case was made out for the plaintiff, which was not rebutted by the defendant.

New trial granted.

(5) 6 Sc. R. 607 ; 5 M. and Gr. 720.

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Dec. 12.

Stephen C.J.
Dickinson J.
and
Therry J.

Crown Prosecutor—4 Vic., No. 22, s. 10—Information—Grand Jury.

There is no distinction between the power of the Crown Prosecutor and that of the Attorney-General in regard to filing informations. The filing of an information is equivalent to the finding of a bill by a Grand Jury, and a conviction, under an information filed by the Crown Prosecutor, is not invalidated by the prosecution being conducted by some other person.

SPECIAL CASE. The prisoner was found guilty at the Quarter Sessions at Parramatta of stealing. After the jury had delivered their verdict, Mr. *Nichols*, who appeared for the prisoner, moved that judgment be arrested, on the ground that the Crown Prosecutor was not personally present in Court to present the information. In his absence the prosecution had been conducted by Mr. *Holroyd*, but the bill had been found by the Crown Prosecutor. The averment in the information was that Mr. *Callaghan*, "who, as such officer for our sovereign lady the Queen in this behalf prosecutes in his proper person, cometh into this Court of Quarter Sessions, &c., and for our said sovereign lady the Queen informs the said Court that, &c." The points reserved by the Court at the request of Mr. *Nichols* for the opinion of their Honors the Judges of the Supreme Court, were, 1st, whether the information upon the facts above stated is valid in law; and, second, whether the judgment can be legally sustained.

Foster, for the prisoner. The Crown Prosecutor was never in Court during any part of the Session. The words of sec. 10 of 4 Vic., No. 22, referring to the Crown Prosecutor, are, "by whom and in whose name all crimes, &c., may be prosecuted." The Court of Quarter Sessions is not constituted till there are two magistrates on the Bench, and then only can the information be filed. The information ought to have alleged that it informed *Alfred Cheeke*, Esq., *David Forbes*, Esq., Justices of the Peace, and others their fellows. 1 *Chitty, Crim. Law* 331. It appears from *Archbold's Cr. Pr.*, 65, that the Court must be sitting when the Grand Jury bring in a bill. The Crown Prosecutor has no further power than is conferred on the Grand Jury. The Attorney-General is a different person, and the Act only requires that the information shall

(1) *The Sydney Morning Herald*, Dec. 15, 1851.

be in his name. The Crown Prosecutor can enter a *nolle prosequi*, but no one can enter one for him. *Chitty, Cr. Law* 479. By the absence of the Crown Prosecutor the prisoner loses the benefit of a *nolle prosequi*, because the Crown Prosecutor cannot appoint a deputy.

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The Crown Prosecutor (*Callaghan*) and *Holroyd* were not called on.

The CHIEF JUSTICE. I have no doubt whatever on this point. The distinction between the power conceded to the Attorney-General in the Supreme Court, and that given to the Crown Prosecutor in the Court of Quarter Sessions, under the Act of Council, 4 Vic., No. 22, is valueless; the section must be read as if the words were *by and in the name of the Attorney-General*. The 9 Geo. IV, c. 83, giving the power to the Attorney-General to prosecute, places him precisely in the position of a Grand Jury to find a bill. In the present case the Attorney-General, or the person who stands in his place, signs the bill, that is to say, like a Grand Jury he finds *billa vera*. The Crown Prosecutor is in the Court of Quarter Sessions in the same position as the Attorney-General in the Supreme Court, and the Act of Council was framed to place him in that position. The Crown Prosecutor is really the person who prosecutes, inasmuch as he finds the bill; but then, it is said, he was not in Court, because he did not conduct the prosecution afterwards in Court. In England the Queen prosecutes; a county may prosecute, or a single individual, but still in every case the Crown really prosecutes; and even the Grand Jury prosecutes for the Crown. After the information is filed, if a private prosecutor comes into Court, he may be permitted to prosecute for the Crown. But when a bill has been found, it is unnecessary for any person to conduct the prosecution ministerially. We are just in the same position here with regard to a prosecution after the bill is found as they are in England. The only difference is that the Attorney-General, or some other person, is in the position of a Grand Jury.

DICKINSON, J. I think the duty of the Attorney-General and Crown Prosecutor end when the information is filed, and that when the case is prosecuted in Court Mr. *Plunkett* appears for the Attorney-General, and Mr. *Callaghan* for the Crown Prosecutor, unless in any particular case they claim the privilege as belonging to them as special advocates for the Crown.

TERRY, J., concurred.

Conviction affirmed.

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Ex parte TOWNS. (1)

April 26.

Stephen C.J.
Dickinson J.
and
Therry J.

Prohibition—Jurisdiction of Supreme Court—14 Vic., No. 43—Merchant Seamen's Act, 13 Vic., No. 28, ss. 6 and 7—"Absent from duty."

The Court has no jurisdiction to grant a prohibition in the matter of a seaman's claim for wages under the Merchant Seamen's Act, 13 Vic., No. 28. A writ of Prohibition, by the Common Law, lies only where the inferior Tribunal has exceeded its jurisdiction, and the Prohibition Act, 14 Vic., No. 43, only extends to Orders and Convictions in criminal cases, or concerning matters in their nature criminal.

(*Semble.*) The forfeiture of wages, created by sec. 7 of the Seamen's Act, and the punishment of imprisonment provided by sec. 6 are cumulative.

A seaman, guilty of an act of insubordination and ordered off duty by the Captain, does not thereby become liable to forfeiture as "absent from duty."

There is nothing in sec. 7 of the Act to limit its application to offences committed in port only.

MOTION for a Prohibition against Messrs. *J.O'Neill Brennan* and *Edmund Lockyer*, Justices of the Peace, and *William Sharp*, a seaman. The matter was argued, April 14, by *Broadhurst*, for the magistrates, *Fisher* for the seaman, and *Darvall* for the applicant.

The facts appear in the judgment of the Court, delivered, April 26, by

The CHIEF JUSTICE. This was a motion for a Prohibition, under the Prohibition and Amendment Act, 14 Vic., No. 43, s. 12, to restrain two of Her Majesty's Justices from proceeding to enforce an Order, made by them under the Colonial Merchant Seamen's Act, 13 Vic., No. 28, s. 15, for the payment of wages to *Sharp*, as a seaman on board *Towns'* vessel, on a voyage from Hong Kong and Amoy to Sydney.

It appears that, in the course of the voyage, *Sharp* was guilty of some acts of insubordination, and that, on the last of these occasions, the Captain ordered him off duty and so kept him (the man never offering to return to his duty) for seventeen days following. On arrival in this Port, the Captain proceeded against *Sharp* for the insubordination, under s. 6 of the Seamen's Act already mentioned, and *Sharp* was sentenced, for the offence, to thirty days' imprisonment. The Justices awarded against him, moreover, a deduction of forty shillings from his wages, for costs, incurred (we presume) in his apprehension.

(1) *The Sydney Morning Herald*, April 15, 27, 1852.

Sharp suffered this imprisonment, and then sued for the balance of his wages, which *Towns* resisted by claiming a forfeiture of six days' pay, under s. 7 of the Act, for each of the seventeen during which the man was off duty. But the justices held that the prosecution and punishment of *Sharp*, under s. 6, precluded all question of forfeiture under s. 7, and they awarded payment of the wages accordingly, certain deductions being allowed, which will be more particularly referred to presently.

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The questions which arise in this case, and on which we have been pressed for an opinion, are stated to be of much importance to the shipping interests, and such as the Magistrates, as well as the parties more immediately concerned, would be glad to have finally decided. We proceed, therefore, to offer our opinions upon them, although, for a reason which will appear in the sequel, those opinions must be considered, whenever the questions shall again arise, as still open to discussion.

On the general question, whether the forfeitures created by s. 7 of the Seamen's Act are *cumulative*, that is to say, are irrespective of and in addition to the punishment provided by s. 6, we incline strongly to think that they are cumulative. But we conceive that the sentence under s. 6, must be either to imprisonment alone, or the awarding of costs alone, not both. The imprisonment, it appears to us, is in its nature and object punishment, as for a crime. The awarding of costs, on the other hand (although undoubtedly in one sense a punishment) seems rather to be intended as a compensation, to the owner, in cases where he does not press for the imprisonment. The forfeiture of wages provided by s. 7, would appear to be of the same character, but to be irrespective of the enactment as to imprisonment. The extreme limit of thirty days might, in many cases, be a very inadequate punishment. The forfeiture of wages, however, in each case, is in due proportion to the offence; that is to say, to its duration, and, therefore to the extent of the injury.

It could hardly be contended, we think, that in a case of (for example) gross insubordination, whereby the seamen would forfeit two days' pay only, the master or owner would, by insisting on that forfeiture, lose his right to prosecute criminally under s. 6. But, if the master or owner may so prosecute, after deducting the forfeiture, in any such case why may he not first prosecute and then insist on the forfeiture? By s. 9, a seaman who deserts forfeits all his wages. If that forfeiture be no bar to his punishment under the 6th section (and it would be difficult to say

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how it could so operate), then the two provisions are cumulative. But if *these* are, why are not equally the provisions in six and seven? It seems to us most unreasonable to hold that they are either cumulative or not cumulative, according to the section under which the owner may first proceed.

We do not say, however that in the present case any forfeiture was established. If no other was relied on than that of which the seventeen days formed the ground, we should not hesitate to express our opinion that none was established. In the first place, the non-performance of duty during those days was, upon evidence, the result of the captain's own act. If, therefore, the man was thereby absent from duty he was not so (in the words of the enactment) wilfully and without leave. But, secondly, the man was not in any just sense absent at all during those days. The absence contemplated is plainly something different from mere refusal or neglect. It would require strong authority to induce us to hold that a seaman can be deemed "absent" from duty who is present on the spot (or, at any rate, in the vessel), able at a moment's notice to do that duty. The offence is, that, being present, he refuses or omits to do it. The absence, in short, must be of the same class or nature with *desertion*, something that, if without the *animus revertendi* (or, possibly, if long continued), may amount to desertion—a bodily, entire absence from the ship, and not a part of it only. Or, if the employment be in a boat, or on a wharf, then the absence must be wholly therefrom. If in any such case the absence were without intent to return, it would be desertion, punishable by imprisonment and a total forfeiture of wages. But, if "not treated as such" by the master, it will be punishable merely as absence without leave.

But although there was here no forfeiture by *absence*, there was (we think) a forfeiture of two days' pay incurred by every act of insubordination or refusal established or which might have been established against the seaman, supposing such act or acts to have been, as the proviso in s. 7 requires, duly entered in the log. And, had the man been daily ordered to do duty, instead of being put off duty, during the seventeen days in question, and then had he refused or neglected such duty, a series of similar forfeitures would have been incurred by him; or, if the refusal or neglect were continued throughout the twenty-four hours, a forfeiture in each case of six days' pay.

It was suggested that the acts of insubordination complained of entitled the Master, immediately thereupon, to discharge *Sharp* from his service, and so, that the man henceforth earned no wages. But

(independently of the objection that this was not the ground on which his claim was resisted) we are by no means prepared to assent to that proposition. It is a very debatable point, to say the least, whether the several provisions in the Merchant Seamen's Act, creating forfeitures, and establishing punishments by imprisonment, specifically, for acts of insubordination, absence, and refusal to do duty, were not (except in cases so flagrant or of such a nature as to render the discharge almost a matter of necessity), intended as substitutes for the power contended for. In the ordinary cases of master and servant, it is not every act of misconduct that will justify immediate dismissal. And in the particular cases of seamen, it has been held expressly that neglect in a single instance (even where the offender acted as Chief Mate), will not defeat the claim for wages, unless followed by injurious consequences; nor will occasional acts of drunkenness, unless habitual. Sir *Stephen Lushington* has laid it down as law that the seaman's misconduct "must be such as to render his discharge necessary for the safety of the ship and the due preservation of discipline." See the cases of *the Blake* and of *the Duchess of Kent*, cited in *Shee's Abbott*, p. 652.

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The forfeitures provided by s. 7, it was contended, apply only to offences committed *in Port*, the previous section being confined, in terms, to offences during or before commencement of the voyage. It has already been seen that we do not adopt this construction. If s. 6 applies, exclusively, to offences committed at sea, or before commencement of the voyage, then desertion, or any act of refusal, or insubordination, however gross, after such commencement, if committed in port, are punishable by forfeiture of pay only. On that question, we distinctly abstain from giving any opinion. But, whatever the true construction in that respect of s. 6, and whatever cause may have suggested the use, in s. 7, of terms varying from those used in the previous section, we see nothing in the language of s. 7, in any part of it, entitling us to say that it does not extend to offences committed at sea, as much as to offences committed in harbour.

The decision in *Sharp's* favour is complained of, as to *amount*, that is to say, not giving the owner credit for certain payments in dollars, at a higher rate of exchange, that the payments were so made, was not disputed; but the justices allowed only 4s. 2d. for each dollar, whereas the claim was 5s. per dollar. The evidence on this point, we must say, was on either side singularly loose and inconclusive. The owner proved, that he paid his own agent the higher rate. For the sailor it was shown, that the British Consul debited only the lower. The question, therefore,

1852. seems to have been one solely of evidence, as to what was, in fact, the current exchange, or market value of the coin. And we see nothing to justify us in holding, that the justices were wrong in adopting the Consul's rate, in preference to that of the agent. It was but a choice between difficulties, where there was no certain guide.

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The important question yet remains, however :—has the Supreme Court any appellate authority, in cases of this kind, over the decisions of justices? And we are of opinion that it has not. By the Common Law the Writ of Prohibition lies, only, where the inferior tribunal has exceeded its jurisdiction. But no such excess is here asserted. The authority which we are asked to exercise, therefore, must be vested in this Court by positive enactment, or we possess it not at all. We turn, then, to the Prohibition and Amendment Act, which was relied on for this purpose, and, after a careful consideration of its provisions, we are of opinion that it extends, only, to Orders and Convictions in criminal cases, or concerning matters in their nature criminal, not to Adjudications or Orders in cases of debt, or on claims or complaints in the nature of suits for debt. Now, unquestionably, many offences are created, or made summarily punishable, by the Merchant Seamen's Act. These, therefore, it would seem clear, are within the former class of cases. But the provision respecting wages, establishing a summary mode for their recovery, does nothing more than confer a jurisdiction purely civil, the exercise of which by the justices, although the proceedings may (in form) commence by way of *complaint*, cannot change the nature of the claim, or make it other than what it in truth is—a suit and not a prosecution.

The remedy by Prohibition, we entertain no doubt, was not provided for any case of that class. If it were, every action for debt, in the several Courts of Petty Sessions, would be equally within the enactment. But the language of the first and ninth section, as well as of the twelfth, which gives to aggrieved parties the remedy in question, is strong to show that cases of prosecution for *offences* alone (or acts in some sense criminal, not being the mere non-payment of money due) were intended to be within that enactment. Taking the three sections together, and considering the use of words "offence" and "party prosecuting," and the provision as to amending errors of form, and respecting the production of copies of depositions we entertain no doubt as to the correctness of this conclusion.

The Rule for the Prohibition, therefore, in this case, must be discharged. And, as we cannot say that the application has failed on a technical point merely, or that in such a case, either the Seaman or the Magistrates (especially the former), should bear the expense of opposition, the Rule must be discharged with costs.

Prohibition refused.

REGINA v. TAAFE. (1)

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*Bigamy—Evidence—Marriage register—Identity of parties—3 Vic., No. 7, sec. 4—
Objection not taken at trial—Estoppel.*

April 16.

Stephen C.J.
Dickinson J.
and
Therry J.

On the trial of a prisoner for bigamy there was no direct evidence of the first marriage, but the fact of a marriage between certain parties was proved by the registry book, and evidence was given of the acts of the prisoner and his alleged first wife to identify them as the parties so married. *Held*, the evidence was sufficient to sustain the conviction.

By sec. 4, 3 Vic., No. 7, a copy of a duplicate certificate to be filed in the Supreme Court was made the only evidence of a marriage under the Act. *Held*, although the marriage was proved by the original register, and it was no part of a minister's duty to keep the same, the prisoner was estopped from relying on the objection, the exclusion of the evidence not having been claimed at the trial.

SPECIAL CASE. The prisoner was tried and convicted of bigamy before His Honor the *Chief Justice*. In proof of the first marriage a registry book was produced, kept by the officiating Wesleyan minister, and containing an entry, signed by the parties, that two persons, named respectively *William Taafe* and *Caroline Stewart* were on the day therein named united in marriage by the Rev. *Lewis*. The signature of Mr. *Lewis* was proved by the Rev. *W. B. Boyce*, the head of the Wesleyan body in this Colony. There were two witnesses, one of whom appeared by his signature to bear exactly the same name as the prisoner. There was evidence that the father of the prisoner was living at the time of the marriage, but none that his name was *William*. There was no direct proof of the marriage, but the father of the first wife proved that prisoner and his daughter had, after the time of the alleged marriage, lived together as man and wife. The points now before the Court were, first, that there had been no legal evidence of the marriage or of the prisoner's identity with the person alleged to have been married; and secondly, that, in the absence of such strict legal evidence, no proof for the purpose of raising a presumption of marriage would be sufficient.

Purefoy, for the prisoner, contended that the first marriage must be strictly proved. The signature, too, of the witness, *William Taafe*, might have been that of the prisoner himself. *Whitlock v. Waters* (2); *Best on Presumptions*, 69.

(1) *The Sydney Morning Herald*, April 17, 1852.

(2) 4 C. and P. 375.

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Their HONORS were of opinion that the evidence, if admissible, was sufficient to sustain the conviction, for the fact of a marriage having been proved by the registry between certain parties, the evidence of the subsequent actings of the prisoner, and his alleged first wife, was sufficient to identify them as the parties so married, and these were the kind of proofs recognised and defined by Starkie, pp. 353 and 699. It was also, however, the opinion of their Honors that the registry produced at the trial was not strictly admissible as evidence under the act, inasmuch as this was a registry kept by the solemnising clergyman himself, and the Act declared that *a copy of a duplicate certificate* to be filed in the Supreme Court, was the proper and only evidence. A question now arose, therefore, as to whether or not, the objection not being taken at the trial, the Court was bound to act upon it in the then stage of the case.

Purefoy contended that it came within his objection to the sufficiency of the proof of the marriage. Prisoner should not be prejudiced by the omission of counsel.

The *Solicitor-General*. The prisoner is estopped from raising the objection.

The COURT sustained the conviction. Their Honors had no doubt that the objection itself to the admissibility of this piece of evidence was well founded. The Act had declared in express terms that a duplicate certificate register of the marriage should be signed by the parties and recorded in the Supreme Court, and that a certified copy of the document thus recorded should be legally admissible as evidence of the marriage ; now the document in evidence was an original entry signed by the parties in a book kept by the officiating minister. This might have been admissible if it had been any part of the minister's duty to keep such a register, but this was not the case. The duty was not imposed upon the minister by statute, and was in no way *necessarily* incidental to the performance of this branch of his public duty, as the marriage would be complete without any such registry as this being kept by himself. But although the registry might have been excluded upon these grounds if the objection had been taken at the trial, still as the objection had *not* been taken the prisoner was stopped from relying upon the objection afterwards, and the evidence being thus before the jury was very good evidence for them to consider in arriving at a conclusion. The oversight of the prisoner's counsel was a very natural one, for the objection was one not likely to strike any one without reflection, and did not in fact strike

either the Judge or the Crown Prosecutor at the time, but the Court nevertheless could not in this instance see any grounds for recommending the prisoner for pardon, as was sometimes done in cases where a conviction had taken place upon improper or insufficient testimony, for the fact was that the evidence admitted, being an original document signed by the parties, was really of a higher character than the evidence *really* admissible. The Jury, therefore, could not by any possibility have been misled.

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The Court.

Conviction affirmed.

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REGINA v. KORFF. (1)

April 16.

Stephen C.J.
Dickinson J.
and
Therry J.

False pretences—Falsity known to prosecutor—Arrest of judgment.

A finding of the jury that prisoner is guilty of obtaining a cheque by false pretences, but that the person from whom it was obtained knew that the representation was false, amounts to a verdict of not guilty.

On a motion in arrest of judgment the Court will not refer to the evidence, but to the record alone.

THE defendant, *John Korff*, had been tried before his Honor, Mr. Justice *Therry*, upon an indictment charging him with having obtained a cheque from one *Sayers* by false pretences, and the jury had found a verdict to the effect that the defendant was guilty, but that *Sayers*, at the time of giving him the cheque, knew that the statement of account under which it was obtained was false and fraudulent. Prisoner's counsel applied at the time to have the jury directed that such a finding was tantamount to a verdict of not guilty, and his Honor reserved the question for the consideration of the Full Court.

The *Attorney-General* prayed the judgment of the Court and applied for leave to refer to the evidence before the jury.

The COURT held that such evidence could not be referred to, as the case must be decided solely upon the record.

Foster and Broadhurst, for the defendant, moved in arrest of judgment, that the finding was substantially one of acquittal. Mr. *Sayers* could not have been deceived by the false pretence. The case cited at the trial, *R. v. Ady* (2), was incorrectly reported.

The *Attorney-General* admitted that being driven to rely upon the mere record, and without reference to the evidence in the case, he could not urge what he conceived the most important arguments in support of the conviction, namely, that the finding of the jury was consistent with their belief in actual guilt under this indictment, and amounted consequently to a complete verdict of guilty.

(1) *The Sydney Morning Herald*, April 17, 1852.

(2) 7 C. & P. 140.

He submitted the expression of opinion as to *Sayers* was mere surplusage, and secondly, that it might be held to amount merely to a statement that *Sayers* knew of the fraud from other sources, but without at the time he parted with the cheque to *Korff*, believing that the latter was really acting thus fraudulently, and consequently, that he had parted with the cheque because of his reliance upon *Korff's* statement, although he had had previous intimation of the fraud from a person in whom he placed less reliance.

The CHIEF JUSTICE had no doubt that judgment in this case must be arrested. The learned judge who tried the case (Mr. Justice *Therry*) had acted with very proper care in a matter of so much importance, by reserving the question for the consideration of the Full Court, especially when he had before him the reported opinion of Mr. Justice *Paterson*, in support of a verdict of this kind. It was clear, however, that this opinion had never been expressed, but was an error of the reporter's. The question then raised was precisely the same in effect as if it had been raised by the special case, for even in the latter case the Attorney-General, in seeking to refer to the evidence, would have been met by the Court with the decision that the question of evidence was one solely for the jury, and the judges could only look at their finding. And it was impossible to avoid the conclusion that this finding must have been come to by the jury for the express purpose of enabling the Court to decide upon the law of the case. Substantially, then, in its effect, the verdict was one of not guilty, for it was clear that a man could not be held convicted of obtaining a cheque under false pretences, when it was expressly found at the same time that the person giving the cheque had not given it in consequence of those false pretences at all. If the facts were really as alleged, the defendant was both a cheat and a rogue, but he did not obtain the cheque through his cheating and roguery.

DICKINSON, J., was of the same opinion. A charge of obtaining money or goods under false pretences was convertible into a charge or assertion that the person parting with such money or goods had done so in a belief that these false pretences were true representations. The jury here had said that *Sayers* was aware of the fraud, and consequently he could not have been imposed upon. In strictness, the jury ought to have been told that their verdict was one of not guilty; but it is probable that they might still have adhered to their peculiar finding, and in this case the learned judge might, if he thought fit, have directed a verdict of not guilty to be entered, but his Honor had very properly decided upon the better and less rash course, of having the question argued before the Full Court.

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THEBRY, J., concurred. The verdict, taken as a whole, amounted for the reasons already stated by the other judges, to one of not guilty, and this was his opinion at the time of the trial, but having before him the reported opinion of Mr. Justice *Paterson* (although he believed the report to be erroneous) and being unwilling to decide a question of such moment upon his own responsibility, he had preferred reserving the points for the consideration of the Full Court. This course also was taken with the concurrence of the parties interested, the Crown having tacitly, if not expressly, consented to the admission of defendant to bail.

Judgment arrested.

ATTORNEY-GENERAL v. RYAN [No. II]. (1)

1852.

*Crown grant—Reversion in the Crown—Statute of Uses—Grant to Trustees —
“Office found.”*

July 14.

Stephen C.J.
Dickinson J.
and
Therry J.

A grant having issued for certain land in Sydney to R. and C., and their heirs and assigns, in trust for E., with the usual declaration that the land was given for building purposes, and reservation of a quit-rent, R. on the decease of E., C. being also dead, claimed to be entitled to the fee-simple.

Held, the building clause was not part of the *trust*, but the consideration or condition on which the grant was made, and therefore, on the death of the *cestui que trust*, the Statute of Uses vested the remainder in the Crown. And no “office found” was necessary to entitle the Crown to possession.

JUDGMENT was delivered in this case by—

THE CHIEF JUSTICE. This is an Information of Intrusion, to recover possession for the Crown of certain land in Sydney, to which the defendant has pleaded, claiming the property as the survivor of two grantees thereof in fee. The Attorney-General replies, setting out the grant relied on, by which it appears that the land was given to the defendant, and another person, *and their heirs and assigns, in trust for Frances Elliott*, who being deceased, the Crown claims to be entitled. The defendant has demurred to this replication, on the general ground that it establishes no present title in the Crown. And the questions raised are, not merely whether the grant gave an estate in fee, to the parties named, subject only to a life interest for the benefit of *Frances Elliott*, but whether, supposing the Crown to be eventually entitled by the determination of that estate or interest, an “Office Found” was not necessary, or a decree declaring the determination of the trust, in order to entitle the Crown to possession.

The grant contains the usual declaration, that the land is given for the purpose of building, and the general improvement of the town; and there is the usual reservation, in perpetuity, of a certain amount of quit rent. From these clauses, and the fact of a limitation to the heirs, with the absence of any expressed limitation over, on the determination of the life estate, Mr. *Broadhurst* contended that an intent to create a perpetual interest, in the grantees, must be inferred, having regard, especially to the rule of construction (in grants of the Crown's grace and

(1) *The Sydney Morning Herald*, May 1, July 16, 1852. Cited 3 S.C.R. 23.

1852. certain knowledge) in favour of the subject. The *Solicitor-General* maintained, on the contrary, that the grant was wholly void for uncertainty ; but that, if it had any operation, it clearly conveyed an estate for life only, and in *Frances Elliott* herself, not the parties named as trustees for her. The reversion, therefore, was necessarily in the Crown as grantor. No intention could be inferred to benefit those parties individually. And no proceeding by Bill or Office Found, in a case where such a reversion appeared on the face of the grant, could be required.

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Several cases and authorities were cited, from 2 *Y. and Jerv.* 605 (2) ; *Ch. Pr.*, 394 ; *Moore's R.*, 876 ; 2 *Dyer*, 169, a ; 1 *Brown's Ch.*, 204 ; 1 *W. B.*, 118 ; *Davis' R.*, 45 ; 7 *Ves.*, 201 ; 9 *Co. Rep.*, 131 ; and from *Lew. on Trusts* ; *Bac. on the Statute of Uses*, and the 1st and 2nd. vols. of *Sdrs. on Uses*.

We have considered this case, and our opinion is that the Crown is entitled to judgment. The grant, whatever may have been the impressions of its framer, gave the legal estate in the land to *Frances Elliott* ; the Statute of Uses operating, equally, whether the word "use" or the word "trust" be adopted. And, with respect to one of the arguments used, that the operation of the statute is excluded, because here there were special trusts, the answer clearly is that there were in this case no such trusts. The Crown gave the land, not upon *trust* to build or improve, but the expectation of such improvements formed the *consideration*, if not the *condition*, upon which the grant was made. And that consideration, it is plain, moved from *Frances Elliott*, not from the trustees. She, for her life, was constituted the owner, and, as such, was to pay the stipulated rent, and improve the property. In so many words, of course, this is not said ; for, if it had been, there would have been no room for controversy. But such, it appears to us, is the necessary implication from the gift itself. What interest had these trustees, that *they* should pay or improve ? If, therefore, there were any value in the argument, respecting trusts resulting by implication "to the party from whom the consideration moves" (see *I. Sdrs. on Uses*, ch. 2), and the clause respecting building or improvements be regarded, strictly, as a consideration for the grant, and not rather as a stipulation or declaration merely, that argument could not benefit the defendant.

But the authorities cited by the *Solicitor-General*, and to which we have referred, appear to us to be quite decisive. The rule is stated in *Saunders*, with the reason on which it is founded, thus : "Where any

part of the use is limited from the feoffer, and the residue left undisposed of, the express declaration in this case is presumptive proof, that he did not mean that the grantee should have the remainder" (3). And he adds, "Therefore, if an estate be granted, even for valuable consideration, to feoffees, *and their heirs*, to the use of them *for their lives*, it should seem that the remainder of the use will result to the grantor." Now the present is a strong case. There, the feoffees themselves had the legal estate, and the limitation to them for life, appears to be inconsistent with their previously created estate in fee. But, here, the limitation to the two trustees, and their heirs, might have been introduced, in order to maintain the estate of *Elliot*, in case of their both dying in her life-time. The passage quoted from *Lord Bacon*, however, is exactly to the point. "A patent itself implieth an use," he says, "if none be declared." But then he proceeds thus, "If the King give lands by his letters to I. S., *and his heirs*, to the use of I. S. *for life*, the King hath the inheritance of the use, by implication of the patent, and no office needeth, for implication, out of matter of record, amounteth ever to matter of record" (4). So that, in this case, on the death of *Frances Elliot*, the Crown again became seized of its former estate, and the defendant is consequently, on the face of these pleadings, an intruder.

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Demurrer overruled.

(3) I. Saunders, 5th ed., 102, and cases there. (4) Bacon, Stat. of Uses, p. 66.

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July 28, and
on appeal be-
fore the Privy
Council, Nov.
27, 1855.

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Dickinson J.
and
Therry J.

Ejectment—Crown grant—Void for uncertainty—6 Will. IV, No. 16—Equitable construction of statutes—Estoppel—Evidence—Proof of matters in pais to avoid apparent uncertainty in description—Alleged forged conveyance—Onus of proof—Handwriting of deceased witness.

The plaintiff claimed the land in dispute as heir at law of N. D., who died in 1830, about 18 years before the commencement of this action. N. D. was in possession for many years before and up to the time of his death, and two Crown grants had issued to him in respect of the said land, the first, dated January, 1794, of land described as 120 acres, "lying in the district of Bullanaming, and separated on the north by a road of 200 feet wide from the land allotted for the maintenance of a school-master; to be known as Burran Farm, without the town of Sydney"; the second, dated October, 1799, describing the land granted as 90 acres, "lying in the district of Bullanaming, bounded on the south-west by Page, Candells, Jenkins, and Field Farms, from which it is separated by a road 200 feet in width; and on the south by an allotment belonging to Samuel Burt—to be known as Burran Farm." The defendants relied on a conveyance, in October, 1827, of the said lands by N. D. to B. R., under whom they claimed, but this the plaintiff declared to be a forgery. The witnesses thereof, as well as both N. D. and B. R., had died before the trial, but proof of their handwriting was given. The jury found for the defendants.

Held, on motion for a new trial, that the first grant was void for uncertainty of description, and probably the second also, unless it could be shown that the description in the latter could refer only to one piece of land.

The said grants, although executed by the Governor in his individual name, were not private conveyances, but Crown grants, and as such recognised by 6 Will. IV, No. 16, as being as effective as if issued in the name of the Sovereign. But the statute did not avoid the effect of the uncertainty in the description, and could not be extended thus by equitable construction.

A grant might be made certain by extrinsic facts, referred to in such grant, but those in question contained no such reference, beyond an intended future name.

The defendants were not estopped from denying the validity of the grants to the person under whom they claimed, inasmuch as the invalidity was apparent on the plaintiff's case.

(*Per Dickinson, J., and Therry, J., the Chief Justice dissentiente.*) A direction to the Jury, that they should decide whether the conveyance to B. R. was forged or not, as if B. R. were on his trial for that offence, was wrong.

On appeal to the Privy Council, *held*, if there be such a description in a Crown grant, whether by descriptive words, or by reference to matters in pais, or otherwise, as that by evidence connected with such description, the identity of the lands granted is capable of being established, the grant may be good. The facts that both grants mentioned some boundaries, the receipt of quit rent by the Crown, the survey by N. D. and a Government surveyor in 1822, were some

(1) *The Sydney Morning Herald*, May 10, July 20, 28, and 29, August 2, December 15, 1852, and May 7, 1856.

evidence to go to a Jury as to the identity of the lands, and as to the probability that possession was given by Government officers, at or soon after the time of the grants, by which they might be made good.

The Jury would have been justified in presuming from the long possession of N. D., not a substitutional, but a supplementary and confirmatory grant by the Crown.

The *onus* of proving the conveyance to B. R. was on the defendants, and His Honor's direction thereon at the trial was wrong.

The admission in evidence of the handwriting of a deceased witness to the conveyance was wrong, but was right in the case of another witness, also deceased, who, on examination upon interrogatories, had denied his signature to the conveyance (the handwriting in the latter case, however, being the witness' signature taken during his examination).

NEW trial motion. The facts in this case are fully set out in the judgment of the Court, which was delivered, July 26th, by—

The CHIEF JUSTICE. This was an action of Ejectment, to recover a *July 26.* tract of land comprising 210 acres, situate at Newtown, in the parish of Petersham, in the county of Cumberland. There were two demises, one by *Edward Devine*, and the other by *John Devine*, but at the trial, which took place before myself in March last, the first demise was abandoned.

The plaintiff, *John Devine*, claimed the property, as heir-at-law of one *Nicholas Devine*, who died in this colony, in or about the year 1880, eighteen years before the commencement of this action. And there was abundant evidence to establish the fact of that heirship. Part of such evidence, however, was taken under a Commission issued by this Court, to persons resident in Ireland, to the admissibility of which last-mentioned evidence, objections (not now necessary to detail) were raised by the defendant's counsel. There was abundant evidence, also to show the continued possession in *Nicholas Devine*, for a long series of years immediately before his death, of a house and considerable quantity of land adjoining, called Burran Farm, at Newtown, on which some of the defendants now reside. That possession, in fact, as to the house and some few acres surrounding it, was proved to have extended over a period of twenty years or upwards. There was great difficulty in showing, however, how far and where the exact boundaries of the farm extended. But the question as to that extent was most material, because the defendants are twenty-five or more in number, and defend separately in respect of different portions of the land sued for.

Up to the time of *Nicholas'* death the property claimed was (except as to the portion near the house) wild and uncultivated, and the neighbourhood, in general, was without inhabitants. In the course of

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eighteen years, the land has become of very great value ; it has been highly improved, by parties who have purchased portions of it from time to time ; and mansions which have cost several thousand pounds, as was admitted, have been erected on it. Evidence was given to show that *Nicholas Devine* had cattle running on this land (that is to say, on land called *Burran Farm*), in various directions, for many years, and that in the year 1822, he employed a government surveyor to go over the whole with him and mark his boundaries, which was done accordingly (the witness said) from a Government chart. This, therefore, establishes possession, to the extent of these boundaries, at and from that date. I refused to receive evidence of a general nature, offered to show the supposed or understood boundaries, or to receive the Surveyor's Field Books, he being long since dead, as proof of what he measured. It was proved, that all or most of the defendants occupied land, within the boundaries gone over in 1822 as aforesaid.

The plaintiff then gave in evidence two Crown Grants to *Nicholas* (which the defendants produced, upon notice to them in that behalf), each being of land *to be known as Burran Farm* ; in which, respectively, the description is as follows : In the first, dated the 8th January, 1794, the land is described as 120 acres, "lying in the district of *Bulanaming*, and separated on the north by a road 200 feet wide, from the land allotted for the maintenance of a schoolmaster ; to be known as *Burran Farm*, without the town of *Sydney*." In the second Grant, dated the 8th October, 1799, the land is described as 90 acres, "lying in the district of *Bulanaming*, bounded on the south-west by *Page*, *Candell's*, *Jenkins'*, and *Field Farms*, from which it is separated by a road 200 feet in width ; and on the south by an allotment belonging to *Samuel Burt* ; to be known as *Burran Farm*." The district of *Bulanaming*, it seems, is the same as that now called *Newtown*.

At the close of this case, the defendants moved for a nonsuit, on the ground that the plaintiff had failed to establish his title, inasmuch as he claimed under grants, both of which were void for uncertainty. The Attorney-General, for the plaintiff, refused to be nonsuited, observing that the question might be reserved for the Court in Banco. The defendants then entered into their case in defence, which was, that *Nicholas Devine* had conveyed the whole of the land claimed, he being at the time a very old man, and infirm, and without any relatives whatever in the colony, to one *Bernard Rockfort*, with whom he was on terms of great intimacy, and who lived in his house and took care of him. The defendant's counsel relied on this simply, as showing

the title out of *Devine*, without deducing any to themselves. It was stated, however (or, by the course taken in the defence, it clearly appeared), that they in fact all claimed under *Rochfort*.

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To substantiate the defence of title in that person, the defendants produced certain deeds of conveyance, dated severally in October, 1827, all bearing (or purporting and appearing to bear) *Nicholas Devine's* signature, two being a lease and release to *Rochfort*, of the lands in question, by the descriptions contained in the Grants, and one being a lease for life of the same, bearing date the following day, from *Rochfort* to *Devine*. There was, moreover, a duplicate of the latter deed, similarly executed. Each was attested by three witnesses, all of whom, as well as *Devine* and *Rochfort*, being dead, proof was given of their handwriting respectively. Registered Memorials of these conveyances, dated the 30th August, 1828, were also put in evidence.

In reply to this case (or, rather, as to great part of his evidence, in *anticipation* of it), the plaintiff adduced evidence to show that the several documents were forgeries; and that, if genuine, yet *Devine* was in such a state of imbecility as not to be able to know what he was doing. The defendants called witnesses, and produced documents, on the other hand, to establish the fact of his capacity, and intelligence of mind, and to rebut the imputation of forgery, so set up against *Rochfort*. On these points, nearly forty witnesses were examined, and numerous papers of various kinds put in evidence, the character and position of *Rochfort* were shown, and strongly commented on; the state of *Devine's* real or probable feelings, towards his family at home, was inquired into; several of his transactions were traced, as far as possible, to throw light on the subjects under investigation; there were witnesses on both sides as to the handwriting of the various persons whose names appeared to the several deeds; every available means, in short, in a case where most of the principal actors were dead, was resorted to on either side for eliciting the truth, as it appeared to each to be. But such questions are ever full of difficulty; and they were rendered in this case unusually painful, by the mass of conflicting testimony. In the whole above thirty documents were adduced, and sixty witnesses examined.

I told the Jury that it was for the plaintiff, in this, as in every other case of Ejectment, to make out his title;—that the possession shown in *Nicholas Devine*, *prima facie*, was evidence of title; but that whether, having reference to the Grants, he had such a title was a question of law to be thereafter decided. I said that, as it appeared to me, the heirship of *John Devine* was established. I made some remarks on the

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defence, and on the answers to it which were relied on by the plaintiff. And I concluded my address, by requesting their answer to the six following questions, on the first four of which, I explained, the plaintiff's case depended, the last two, however, if answered in the affirmative, deciding the result in favour of the defendants.

The following were the questions :—1. Is the land in dispute claimed in fact by the plaintiff, under the two grants of 1794 and 1799 respectively? 2. Do you believe that those grants relate to the land which in fact was possessed by the Grantee? 3. Independently of the Grants, are you satisfied that *Nicholas Devine* was in possession, claiming the fee of the land in dispute in this action? 4. Is *John Devine* (the lessor of the Plaintiff in the second demise), the said Grantee's heir at law? 5. Was the Conveyance, or writing relied on as a Conveyance, of October, 1827, executed in fact by the said *Nicholas*? 6. And was it so executed, when he was in a state to know, what he was doing? The Jury answered all these questions in the affirmative; and returned their verdict for the defendants accordingly.

A Notice of Motion for new Trial, according to the practice of this Court, was thereafter filed by the plaintiff, in which several grounds were taken, the principal being, that improper evidence was received as to hand-writing, and that the verdict was against evidence. On the making of that motion, in the last term, the learned Attorney-General was required by us to confine himself in the first instance, to the question which arose on his own case; namely, the invalidity of the title adduced by the plaintiff, inasmuch as even if there had been no valid conveyance to *Bernard Richfort*, yet it was clear (as it seemed to us) that the plaintiff could not recover, unless the evidence at the trial made out such a title, as would countervail the defendants' possession. And we intimated our impression, that the grants to *Nicholas Devine* were void for uncertainty; as the descriptions therein, respectively, showed no specific boundaries.

The *Attorney-General* and Mr. *Purefoy*, for the plaintiff, then submitted the several points following :—

First.—That as there was general evidence, showing possession in *Nicholas* of a place called Burran Farm, at Newtown, there was no necessity to prove any boundaries at all. For this position, they cited *Cottingham v. King* (2), *Connor v. West* (3), and *Doe v. Gunning* (4).

Secondly.—That the possession for 20 years, which it appeared in evidence that *Nicholas* had enjoyed (as to at any rate a portion of

(2) 1 Burr. 630.

(3) 5 Burr. 2673.

(4) 7 A. & E. 240.

the property), created in him a title against the whole world. They cited as to this *Stokes v. Berry* (5), *Stocker v. Berney* (6), and *Denn v. Barnard* (7).

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Thirdly.—That, as the house in which *Nicholas* lived for above twenty years, and the land immediately about it, were during all that time known by the name of "Burran Farm," and as, some years before he died, he procured the Government Surveyor to measure his boundaries, which were taken from the Government map of surveys, and then went round those boundaries with him, the fair inference was that the boundaries so measured were those of (or, in other words, comprised) the land which *Nicholas* had always, from the beginning; and that, as they embraced the parcels now held by the defendants, there was a possession in *Nicholas* of the whole for 20 years. Such possession, the plaintiff submitted, *together with the Grants*, constituted a sufficient title in *Nicholas*, to countervail the defendants' subsequent occupation.

The learned counsel cited on this point, *Doe v. Cooke* (8), and *Doe v. Welber* (9).

Fourthly.—They contended that the Grants were private Conveyances merely, being in the Governor's individual name, and that they were not vitiated by uncertainty of description, if they could be rendered certain by possession. The land, therefore, was well described as a place "*to be known as Burran Farm*," if that name was afterwards given to it. For this they relied on *Hungerford's case* (10), and *2 Shepp. Touchstone*, 246.

Fifthly.—But, if the instruments were in effect Crown Grants, the plaintiff's Counsel submitted that they were good, on the rule that, if by one construction a Crown Grant would be avoided, but by another it will be made good, the latter shall be adopted. *Priddle and Napper's case* (11), and the cases there, were cited on that point.

Sixthly.—That when a Crown Grant refers to a certainty, though *in pais* only, that reference will be sufficient. And for this they cited *Whistler's case* (12); *The Earl of Shrewsbury's case* (13); *Earl of Cumberland's case* (14); *Stockdale's case* (15); *Plowden*, 397; and *Vin. Ab. Prerogativæ*, c. 2.

Seventhly.—The learned counsel maintained that, if the Grants were void by the law of England, such law could not be adjudged applicable to this Colony, according to the Statute 9 Geo. IV, c. 83, sec. 24.

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| (5) 2 Salk. 421. | (6) 1 Ld. Ray. 741. | (7) 2 Cowp. 595. | (8) 7 Bing. 346. |
| (9) 1 A. & E. 119. | (10) 1 Leonard 30. | (11) 11 Rep. 8. | (12) 10 Rep. 65. |
| (13) 9 Rep. 46 b. | (14) 8 Rep. 166 b. | (15) 12 Rep. 86. | |

1852. Eighthly.—But, if that law be applicable, then that the Grants were at all events rendered good, by the Local Act, 6 Will. IV, No. 16, intituled, “An Act to remove doubts concerning the validity of Grants of Land in New South Wales.” It was submitted, that these instruments only (in effect) began to operate, and had validity, on and from that day; but that, as they *then* had ascertained and occupied boundaries on which to operate, and an acquired and settled name, nothing was at that time uncertain; and so the Grants became valid, even if previously not so. And it was contended that, since the said Act was passed to confer validity on all then existing Grants, the enactment (although it referred only to one defect specifically) ought to be extended by equitable construction, to cover any other, although a different, blemish. For this last point was cited *Dwarris on Statutes*, p. 617.

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Ninthly.—It was insisted that, at all events, the *second* Grant was sufficiently certain.

Tenthly.—The learned counsel observed that there was nothing in the evidence to show that *Nicholas Devins* ever had in his possession, or saw or knew of these Grants, and that the Jury had found, as a fact, that he claimed the land independently of the Grants. But they contended, that even if the Grants were bad, and if the possession of *Devine* was referable to them, yet his possession was nevertheless good, as being prior to the defendants' occupation. For this was cited *Doe v. Dyball* (16).

Eleventhly.—They submitted that no question of boundary can be raised, in any case, in an action of Ejectment. On this point, *Doe v. Wilson* (17) was referred to.

Twelfthly.—But the point most relied on for the plaintiff, and to which we have thought it right, from the earnest zeal with which it was argued, and the important (though technical) principles which it involves, to devote no small portion of our time, was the following. The plaintiff's Counsel urged, that even if the Crown Grants were void for uncertainty, yet, as it appeared that the several defendants claim under *Nicholas Devine*, the grantee, they are *estopped* from taking advantage of the defect. The following cases and authorities were cited on this point. *Doe v. Stone* (18); *Smith's L.C.*, 435, 457; *Bensley v. Burden* (19); *Parker v. Manning* (20); *Jackson v. Ayres* (21); 1 *Greenl. on Ev. s. 22*; *Johnson v. Mason* (22); *Rees v. Lloyd* (23);

(16) 3 C. & P., 610. (17) 2 Starkie R., 477. (18) 10 Jur. 490. (19) 2 Sim. & Stn. 524. (20) 7 T.R. 537. (21) 14 Johnson's N.Y. Rep. 224, cited from 1 New York Analytical Digest, *tit Estoppel*. (22) 1 Esp. 91. (23) 1 Wight 130.

Doe v. Skirrow (24); *Com. Dig. Estoppel*, B.; *Doe v. Mills* (25); *Doe v. Powell* (26); and 1 *Sdvs. Pl. and Ev.* 66—citing *Doe v. Francis* (27); *Cooper v. Blandy* (28); and *Fleming v. Gooding* (29).

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We have fully considered and discussed the several topics, and arguments, which I have thus enumerated; and have referred to, and considered, the numerous authorities cited, and we now proceed to give our opinion on the several points, each in its order.

With respect to the first point which was made, the cases cited do not appear to us to bear upon it. For the only question in those cases was, whether there was such an uncertainty on the face of the Record, as would warrant an Arrest of Judgment. It must be obvious, on principle, that whenever the plaintiff in an Ejectment claims a title to land, he must prove a title to so much as shall, at the least, comprehend that which he does so claim. We do not exactly see, how far the point contended for is material to the question so decided; but, be its value what it may, we are of opinion that it is in general necessary, in Ejectment, to prove (incidentally at least) the boundaries of the land sued for. Where there is only one defendant, who defends the possession of the whole, the precise extent or quantity claimed may not be material; and the Sheriff, in such cases, will probably put the plaintiff into possession, upon an *habere*, by boundaries to be then pointed out to him. But where, as in the present case, there are many defendants, each answering only in respect of that portion of land, which he separately claims, the question of boundaries is one which, as it seems to us, clearly cannot be excluded.

On the second and third points we concede readily that possession for 20 years, or for so many hours, is, *per se* good evidence of a seisin in fee. That point is abundantly proved by *Peaceable v. Watson* (30), and many other cases. The possession of *Nicholas*, therefore, by itself, would have been sufficient to prevail over the posterior possession of the defendants, even if of 18 years' continuance. The cases cited establish this distinctly. Moreover, on principle, the law must be as contended. For, as any possession, however short in duration, is some evidence *prima facie* of a legal title in fee, and as, up to the time of his death, *Nicholas Devine* had possession (we are not now considering to what extent, or whether this *prima facie* evidence was or not eventually overthrown), he appeared to have at that time such a title. But the law presumes the continuance of

(24) 7 A. & E., 157. (25) 2 A. & E. 17. (26) 1 A. & E. 531. (27) 4 M. & W. 331.
(28) 1 Bing. N.C. 45. (29) 10 Bing. 549. (30) 4 Taunt. 16.

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things, shown at a particular time to have existed, until some evidence is adduced of a change in them. In the absence, therefore, of any evidence showing a conveyance from *Nicholas* to some other person, the fee would be presumed to have descended to his heir ; and the possession of the defendants, consequently, would be considered tortious, since a title in ejectment is not barred by the Statute of Limitations, by any possession less than twenty years. All this, however, leaves the question as to the grants untouched.

As to the fourth and fifth points. We think it impossible to regard the instruments in question, as any other than Crown grants. The Act of 6 William IV, clearly recognises all such instruments, in effect, as Crown grants, but *informal* only. The land purported to be conveyed is Crown land ; the Governor is described, as acting in that capacity ; and the seal affixed, is the public seal of the Colony. Assuming the two instruments produced, then, to be Crown grants, or instruments subject to the same rules of constructions, and that they do not describe the properties with sufficient certainty, *Hungerford's case* (31) is decisive that they are wholly void ; although, had they been conveyances from a private person, the uncertainty might have been aided, by the grantee's selecting the parcels from the grantor's land for himself. That the place was *not* well described, as a place "to be known as Burran Farm" (although that name was afterwards given to it), appears to us to be shown by the passage in *Sheppard's Touchstone*, cited in support of the contrary proposition. The following is the passage—"Anything may be granted, by the name whereby it is and hath been usually called of latter times, within nine or ten years or thereabouts ; albeit it be an improper name, and not the ancient name of the things, but a name newly gotten. Even a short period will suffice, if the name be fixed ; as if a man grant all that close called A, which is intended and agreed shall be *thenceforth* called B ; and the *next day* he further grants all that close called B, the close would certainly pass." That is to say, although the shortest period will suffice, yet the name must be actually in existence *before* the grant, or it would not be sufficient.

We agree, that where two constructions of a grant are possible, the one which will sustain it shall be adopted. But we really cannot see how more than one construction, can be put on the words of either grant here. We can imagine no construction, in either case, which could alter the description of the property supposed to be conveyed.

In like manner, on the sixth point taken, we agree that, when a grant may be made certain by the consideration of extrinsic facts referred to in such grant, the instrument will be sustained. But in neither of the grants, in this case, is there any reference to such extrinsic facts, as would assist us in construing the instrument. Beyond the reference to an intended future name, there is nothing.

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The next point is the seventh. We can discover no ground for holding, that this portion of English law is not applicable to this Colony. It is no matter of local concernment, or of mere fiscal regulation. Neither is the rule simply technical, however harshly it may operate in particular instances. We can conceive few things more beneficial, or more strikingly applicable to a new and thinly-peopled country, that a rule which so much conduces to the safe acquisition of its lands, a rule which requires all grants of them, to indicate with such particularity the tracts and quantities intended to be conveyed, that each settler may certainly know his own; and that the infant commonwealth may not be agitated, by vexatious law-suits about disputed property.

As to the eighth point. All that the local Act accomplished is this, that it rendered grants of land, erroneously issued by the Governors of this Colony in their own names, as valid as if they had been issued in the name of the reigning Sovereign. But, for the reasons before stated, if these grants had been originally made in the Sovereign's name, they would have been (or, at all events, the *first* of them would have been) invalid for uncertainty. The Act of Council, therefore, did not render them less invalid. The argument as to an acquired vitality, from the date only of that Act, however ingenious, is clearly untenable. Such a construction, applied to all cases, would throw half the titles of the Colony into confusion.

We have less difficulty, if possible with respect to the suggested equitable construction of the enactment. The observations in pages 626 and 630 of *Dwarris* are conclusive to show that Courts of Law, at this day, exhibit much commendable caution on this head. And we conceive that they will always act more safely, to say the least, by adhering to the maxim "*Expressio unius est exclusio alterius*," than by following the decision on the Statute *Circumspecte agatis*, mentioned in *Bacon's Abridgment*. The law there (Statute, I. 6), is thus laid down. "The words of the Statute, 13 Edw. I. are, *Circumspecte agatis de negotiis tangentibus Episcopum Norwicensem*. Yet this Statute, although only the Bishop of Norwich is mentioned, has been always extended by an equitable construction to other Bishops." Whatever force there

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We now come to the ninth point, which, it will be observed, affects the second grant only. We strongly incline to think, that no one piece of land could be selected, which would exclusively correspond with the description in that grant. We have, however, no judicial knowledge of the art of land surveying, and there was no evidence as to the possible effect of that description. Two lines, however, are given, and a district is mentioned, and a stated number of acres. It is quite possible, therefore, for anything we see to the contrary, that this quantity, having regard to the district, and the two defined boundaries could only be measured one way. If so, this second grant would be good. To determine that question, a new trial would be necessary. But, before sending the case down for the decision of that point alone, the defendants whom it might affect will be entitled to call on the plaintiff to satisfy the Court that the verdict was wrong, in respect of the finding for them upon the merits.

With respect to the tenth point, it is clear from the evidence on my notes that the grants in question were, in point of fact, in *Nicholas Devine's* possession, and relied on by him as constituting his title. In the first place, he procured the Government Surveyor to measure his boundaries, which was done from the Government descriptions, *Devine* walking round the boundaries with him. What descriptions were these likely to have been, but those contained in the Crown grants, aided, probably, by the Government maps? Such, indeed, was the exact assertion of the plaintiff by his counsel, at the trial. Secondly, the plaintiff's witness, *Michael Henry* (called on the first day) declared that, in the year 1821, *Devine* showed him his grants. Thirdly, the Jury have found that *Devine* executed the conveyance of 1827, to *Bernard Rochfort*; and in that conveyance both the grants are recited. It is certain that they existed, and had been by some means procured by *Rochfort*, as forming part of his title, in or prior to the year 1828 (that is, in *Devine's* lifetime), because that conveyance was registered in August in that year. There can be no ground for doubt, therefore, that *Nicholas Devine's* possession was referable to these grants, under which, in fact, as the Jury have found, the land in dispute was claimed

by his heir. And it seems clear to me that such in truth was the meaning of the Jury, in their answers to the third and second questions put to them. The Jury thereby signified, respectively, that, independently of (that is, without looking at) the grants, they were satisfied that *Nicholas Devine* was in possession, claiming the fee; and, secondly, that those grants related to the land, so in his possession. No other conclusion can be drawn, without stultifying the answers themselves, and doing violence to the language used. The Jury do not say that Devine was in *possession* or *claimed*, independently of the grants, but that they (the Jury) were *satisfied*, independently of the grants. And it is inconceivable that they should have said the heir claimed under those grants, and that the grants in fact related to the land claimed, and which *Nicholas* possessed, and that, moreover, the same *Nicholas* transferred that land by a conveyance, which recited those grants as forming his title, and yet have meant to say, at the same time, that they were satisfied *Nicholas* nevertheless claimed, irrespective or independently of the same grants.

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The possession, under such circumstances, was clearly valueless. *Nicholas's* possession in itself, afforded presumptive evidence (as we have already observed) of a seizin in fee. But such a title can only be, as we judicially know, in these colonies, by grant from the Crown. It being shown, however, that the possession was referable to, and only supported by, two such grants, of which one clearly is, and the other may eventually turn out to be, void for uncertainty, it is now manifest that (as to 120 acres, at any rate, of the land, if not as to the whole), the said *Nicholas* had not, at any time, such an estate as was inheritable by the plaintiff. He cannot, therefore, by reason of his ancestor's prior possession, merely prevail over the defendant's present, though posterior possession. This point (which, indeed, is a cardinal one in ejectment) we consider to be proved by the cases of *Doe v. Barber* (32); *Doe v. Pike* (33); and *Doe v. Barnard* (34). In this action, as every text-book shows, the plaintiff must establish a legal title; and a familiar instance is that a plaintiff may be defeated, though in possession as owner, by the defendant's setting up an outstanding term in a third person. As to *Doe v. Dyball* (35), which was cited on this point, it is no authority to show that a title, apparently good by possession, may not be defeated by proof of its having been enjoyed, in fact, under an invalid grant. The effect of the case is simply this, that a person who is evicted, and who, without acquiescence, proceeds forthwith against the trespasser, is not obliged to prove his title. And

(32) 2 T.R. 749. (33) 3 B. & Ad. 738. (34) 13 Jur. 917. (35) 3 C. & P. 610.

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Stephen C.J. The eleventh point is substantially the same as the first, and has already been disposed of.

The only point now remaining is the twelfth, which raised the question of *estoppel*. Now as to this we remark, in the first place, that, although it is said generally that a person claiming title under another is estopped to deny his title, yet it will be found, on reference to all the cases, that the *estoppel* arises not from the *claim*, but from the *enjoyment* of title. An *estoppel* is thus defined in *Co. Lit.* 352a:—“*Estoppel* is called so, because a man's own act or acceptance stoppeth, or closeth up his mouth, to allege or plead the truth.” The plaintiff's own case here is, however, that nothing passed from *Devine* to *Rochfort*, by reason of the latter's forgery or fraud. But if that be so, then *Rochfort* neither accepted nor had anything from *Devine*. For the same reason, *Rochfort* did no act, which induced *Devine* to alter his position, which is the kind of act that induces an *estoppel*. *Pickard v. Sears* (37). The case, therefore, stands thus:—If nothing passed by the deeds of 1827, then *Rochfort* was not subject to the *estoppel* contended for, according to the definition of Lord *Coke*. If, on the other hand, *Rochfort* was innocent of the frauds alleged, then the plaintiff's case is at an end, for the deeds in question passed the estate away. If *Rochfort* was guilty, the conveyance was void, and so, *Nicholas's* position was unaltered, and no *estoppel* arose. To dispose of this question of *estoppel*, therefore, it is necessary to assume that the transfer really took place; so that *Rochfort* accepted *Devine's* title, and thereby became privy in estate with him. He might then have been estopped (if, in such a state of things, any question of *estoppel* could arise), from pleading uncertainty of the grants, or proving it by evidence, supposing the plaintiff to have made out a *prima facie* case, on the pleadings, or in proof without showing them. But he would not be estopped, from questioning the validity in law of those grants, if the plaintiff himself disclosed them.

If A makes a lease to B. for years, and declares against B for non-payment of rent, the latter cannot plead by way of confession and avoidance that A *nil habuit in tenementis*. But, if A assigns the reversion to C, who, in declaring against B for after accruing rent, is

obliged to allege that "A was seized in his demesne as of fee," B may traverse that allegation, although that virtually is a traverse of A having anything in the premises, when he demised. *Carvick v. Blagrove* (38). Again, it is laid down in *Co. Lit.* 352 b, thus:—"When the verity is apparent in the same record, then the adverse party shall not be estopped, to take advantage of the truth; for he cannot be estopped to allege the truth, when the truth appeareth of record. An impropriation is made, after the death of an incumbent, to a Bishop and his successors. The Bishop, by indenture, demises the parsonage for forty years, to begin after the death of the incumbent. The Dean and Chapter confirm it. The incumbent dieth. This demise shall not conclude; for that it appeareth that he had nothing in the impropriation, till after the death of the incumbent." This passage from Lord *Coke*, and the decision in *Carvick v. Blagrove*, respectively (showing that a tenant may demur in law, where his landlord in pleading discloses, himself, that he had no title when he demised, or may traverse an allegation necessarily made in the declaration, to the effect that he had such an interest) are conclusive to show, that the estoppel "to allege or plead the truth" can only arise, when the party has made out a good case, without necessarily disclosing the defect; in which event the opponent cannot affirmatively set it forth.

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The case of *Manning v. Parker* (39), we think clearly distinguishable from *Carvick v. Blagrove*. In the former case the plaintiff was assignee of a bankrupt, and standing in his shoes, vindicated the cause of action which accrued to the bankrupt lessor. In the latter case, the plaintiff was an assignee of the reversion, suing under the statute 32 Hen. VIII, for a cause of action which never accrued to the original lessor, and in which it was necessary to show, that the lessor had an estate, whereof the reversion could be assigned under the statute.

Assuming, therefore, for the sake of the argument, that, upon the plaintiff's making out a good *prima facie* case, (by proving the possession of *Nicholas*, his death, and *John's* heirship to him,) the defendants would have been estopped from producing the grants, and showing the uncertainty therein, yet they were not estopped from objecting to those grants, when produced as part of his case by the plaintiff himself.

As we have already observed, *Bernard Rochfort* could only be estopped by the deeds of 1827, on the supposition that they were

1852. executed by *Devine*, and not void by fraud. And for this there is the additional reason, that there can be no estoppel without *mutuality*, or, in other words, estoppels must be reciprocal. *Co. Lit.* 352a; and *Gaunt v. Wainman* (40). If those deeds were never executed by *Devine*, or were not binding on him, he was bound by no estoppel, and, therefore, neither could *Rockfort* be so bound. But the defendants in this action could not be bound, if he under whom they claim was not.

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The American case of *Dean v. Cornell*, indeed, cited from 1. *Gresnl. on Ev.*, note to s. 23, and another similar case cited from the *New York Analytical Digest*, would seem to carry the doctrine of Estoppels farther. In the former case, the recital in a father's will, that he had conveyed a certain estate, was held to estop the heir from denying that allegation, although he himself took nothing by the will, nor in any manner claimed under it, and although the adverse party claiming under the conveyance recited, was equally a stranger to the will, and claimed nothing by it. We must with all respect say, that an estoppel seems hardly to have arisen in that case. The recital by the father, no doubt, was admissible in evidence, as a declaration by a person, the apparent owner of property, against his own interest, and so after his death, and in the absence of any other testimony, was sufficient to establish against the heir the conveyance relied on. *Itat v. Finch* (41). In this view, the case has no bearing on the point in discussion. And, with respect to the New York citation, of *Jackson v. Ayres*, a marginal annotation merely, it is much too loose and incomplete, to justify us in permitting it to repel, or affect, the current of received English authorities, to which (if bearing the construction attributed to it) the dictum is clearly opposed.

But neither of those cases, be their authority what it may, touches the main point in the present, that the invalidity here is not, in effect, set up by the defendants, but arises, in fact, on the plaintiff's own case. The defendants, therefore, as was well remarked by their counsel, have done no more than draw the attention of the Court to a point of law. The passage cited from *Sdrs. on Pl. and Ev.* (ed. by *Lush*), p. 66, certainly goes the length of saying that an estoppel holds, even with respect to facts so disclosed. We have, however, examined the authorities, and they do not, in our opinion, support the position in the text. And if it be said, that the Grants here were produced inadvertently, or not as necessary to the case, we dissent entirely from any such supposition. They were produced, as confirmatory of

[(40) 3 Bing. N.C. 69.

(41) 1 Taunt. 141.

the plaintiff's title, and establishing (conclusively, as it was doubtless thought,) that seizin in fee, which the fact of possession showed presumptively only.

It may further be questioned, whether the estoppel relied on in this case is not defeated, by the rule which excluded estoppels, *where the truth appears by the same instrument*. *Rockfort*, and those who claim under him, are (as we have here decided) either estopped by the conveyance of 1827, or not at all. But, in that instrument, the only title recited or alleged in *Devins* is, not of a fee, in general terms, but, that title which the two grants gave him, and possession under them. And those instruments, being then set out in full, disclose of course on their face the exact invalidity now in question.

After further argument upon the merits of the new trial motion, judgment was reserved. On December 14, their Honors gave judgment separately, as follows (42).

The CHIEF JUSTICE was of opinion that a new trial should be refused on all the points.

DICKINSON, J., held there should be a new trial upon two grounds, viz., the misdirection of the *Chief Justice*, in telling the Jury that they were to deal with the question of forgery as if *Rockfort* was really on his trial for that offence, and the fact of His Honor having allowed a certain paper to go before the Jury for comparison of handwriting.

TERRY, J., thought there should be a new trial upon the first of these two grounds, but not upon the second.

The COURT therefore held that there must be a new trial, but that as the first grant had been held void for uncertainty, the second grant would be equally so, unless it could be rendered certain by admeasurement.

Judgment for the defendants whose lands were included in the first grant, with costs up to the first decision of the Court (July 26), on the validity of the grants. The costs of the trial, so far as respects the defendants whose lands were included in the second grant, and the costs of the second argument (on the merits), to abide the event of the second trial.

The plaintiff appealed to the Privy Council upon the whole case, without going to the second trial.

Present: The Right Hon. Lord Justice *Knight Bruce*, the Right Hon. *T. Pemberton Leigh*, the Right Hon. Sir *John Patterson*, the Right Hon. Sir *W. H. Maule*, the Right Hon. Sir *E. Ryan*.

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(42) Very briefly reported, *Sydney Morning Herald*, Dec. 15, 1852.

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Sir JOHN PATTERSON. This was an action of ejectment to recover the possession of 210 acres of land, upon which many houses had been built in the last fifteen years, and which had become a very valuable property. The plaintiff claimed as heir-at-law of one *Nicholas Devine*, who died in 1830. At the close of the plaintiff's case the defendants' counsel applied for a nonsuit, but the plaintiff's counsel refusing to be nonsuited, it was agreed that the question should be reserved for the Court. The defendants then went into their case, and the jury found a verdict in their favour. A rule *nisi* was gained to set aside the verdict and to have a new trial. On the hearing of that rule the Court were unanimously of opinion that the plaintiff's case had failed as to part of the lands, and that he could not in any event recover that part, but they entertained some doubt whether the plaintiff's case had wholly failed as to the residue of the lands. Assuming that the plaintiff's case had not wholly failed, the question arose whether the verdict could be supported on defendants' case. One opinion (? objection) was that the verdict was against the evidence, but this was rightly, as we think, abandoned. A second objection was, that the learned *Chief Justice*, before whom the cause was tried, had misdirected the jury. The learned *Chief Justice* adhered to the opinion which he held at the trial, and thought that there was no misdirection. The other two learned judges however, held that there was a misdirection entitling the plaintiff to a new trial, supposing that his own case had not wholly failed. A third objection was, that improper evidence had been received; as to which point the learned *Chief Justice* and one of the other learned judges held that the evidence had been properly received, the other learned judge held the contrary.

Ultimately the rule *nisi* for a new trial was discharged generally, and leave was given to appeal.

The case has been most elaborately argued in all its bearings, and the cases applicable to it in every view have been fully examined by the learned judges in the Court below, and again by counsel before their lordships here, and it certainly is one which presents considerable difficulties.

The first question is, whether the plaintiff at the close of his case had made out such a *prima facie* case as entitled him to have the opinion of the jury upon it, so that on his refusing to be nonsuited the judge would not have been justified in telling the jury that they must find for the defendants.

Now, the plaintiff, proved that *Nicholas Devine* died in 1830, in possession of a farm, and from 50 to 60 acres of land cleared and

cultivated, and more land not cleared. All this *Nicholas Devine* had occupied for at least thirty years, the farm by inhabiting there, the cleared land by cropping it, and the rest by feeding it with sheep and cattle in such manner as it was capable of being occupied. The plaintiff also proved that he was heir-at-law, and the action was brought within twenty years after the death of *Nicholas Devine*.

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It is not doubted that if the evidence had stopped here such a *prima facie* case of seizin-in-fee and dying seized on the part of *Nicholas Devine*, and of heirship on the part of the plaintiff, was made out as would have called on the defendants for an answer, and proof of a better title. But the plaintiff proceeded further, and put in evidence two grants of lands made by the Governors of the Colony to *Nicholas Devine*, one in 1794 of 120 acres, the other in 1799 of 90 acres, and the defendants contended that both these grants were void for uncertainty, or at all events that the first of them was void on that ground, and so that the plaintiff by his own shewing was out of Court, and could not avail himself of the presumptive seizin-in-fee in *Nicholas Devine*, arising from his possession, which the plaintiff himself had shown to be unlawful in the beginning, and throughout the thirty years of possession, or at most that *Nicholas Devine* was only tenant at will to the Crown, and so had no estate that could descend to his heir.

In this stage of the case the defendants must be taken to be wrongdoers, not having yet shown any title. The first of the grants in question, namely, that of 1794, granted to *Nicholas Devine*, his heirs and assigns, "120 acres of land, to be known by the name of Burran Farm, lying and situated in the district of Bulanaming, and separated on the north side by a road of 200 feet in width from the land allotted for the maintenance of a schoolmaster within the town of Sydney," free of fees, &c., for five years, provided *Nicholas Devine* shall reside within the same and proceed to the improvement and cultivation thereof (timber fit for naval purposes to be reserved for the use of the Crown), paying an annual quit rent of 1s. for every 50 acres after the five years.

The second grant, namely, that of 1799, grants to *Nicholas Devine*, his heirs and assigns, 90 acres of land lying in the district of Bulanaming, bounded on the south-west side by Page, Caudells', Jenkins', and Field Farms, from which it is separated by a road of 60 feet, and on the south side by an allotment granted unto Samuel Burt, reserving timber as in the first grant, and a quit rent of 2s. after five years.

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Nothing is said in this second grant about residence, possibly because *Devine* was already residing under the first grant. The cases principally relied on are, 1st. Term Reports, 30; *Hungerford's case* (43); *Stockdale's case* (44); *Brand v. Todd* (45). These cases show that if in the King's grant there be no description by name, abutments, &c., but only so many acres, the grant is void, for "the patentee shall not have his election as he shall in the case of a common person." In *Brand v. Todd* the distinction is taken if the King grants *all* the waste in D. and on *quod damnum* it be returned that the waste lands contain 120 acres, yet if it contains 300, *all* shall pass, for the grant is general. But if the grant be of 120 acres, and on *quod damnum* it be returned that there are 300, the grant is void. The *ad quod damnum* is to enquire as to the damage, not as to quantity. 2nd. *Shepherd's Touchstone*, 246, does not carry the point further. In *Shepherd's Touchstone*, 229 (in Mr. Preston's Edition of 1821) is this passage; "*In acquirendo rerum domino sedit quod donationes non valent licet inceptae nisi sine perfectae,*" and *Brook's Abridgment, Grant* page 29, is referred to, "but if grants be very ancient, and the things granted have been enjoyed according to the grant ever since the making of it, in this case the grant may be good, notwithstanding some legal defect in some of these particulars as absence of living, &c., for from possession, living &c., will be presumed."

It was agreed on both sides on the argument, that when a Crown grants refer to certainty, though in part only, that reference will be sufficient, and that if by one construction a Crown grant would be avoided, but by another it might be made good, the latter shall be adopted. These propositions are fully established by the following, amongst many other cases:—*Priddle and Napper's case* (46); *Whistler's case* (47); *the Earl of Shrewsbury's case* (48); *the Earl of Cumberland's case* (49); *Stockdale's case* (50); *Viner's Abridgment*, (Prerogative, Grant).

Such is this law as to grants of the Crown made *ex certa scientia et mero motu*. It is true that such grants are, according to the books, construed most favourably for the grantee. It is also true that the grants now in question are not made *ex certa scientia et mero motu*, but for consideration, namely, quit rents after five years, and a condition in the first grant that the grantee shall reside on the granted land, and proceed to the improvement of it, and that timber fit for the Navy is reserved in both. But the principles above stated merely apply to

(43) 1 Leonard 30. (44) 12 Rep. 86. (45) Noy 29. (46) 11 Rep. 8.
 (47) 10 Rep. 65. (48) 9 Rep. 46 b. (49) 8 Rep. 166 b. (50) 12 Rep. 86.

all Crown grants. It should seem, therefore, that if there be such a description in a Crown grant, whether by descriptive words, or by reference to a matter *in pais* or otherwise, as that by evidence connected with such description, the identity of the lands granted is capable of being established, the grant may be good, although the description be in itself so imperfect. The sufficiency of such description, and the legallity and mode of supplying by evidence any defect in it are hardly touched by the cases.

The grants in question are not wholly without description, as the Court in its judgment seems to consider. The second grant mentioned boundaries on the south-west, and the south side, and even the first grant mentions a boundary on the north side. The evidence showed the possession by *Nicholas Devine* for thirty years of land, the position of which is consistent with the grants, and so far as there is any description in the grants tallies with it. This possession of *Nicholas Devine* might indeed, if it stood alone and unsupported, be possibly referred to some supposed election made by him, which election he could not by law make against the Crown; but when it is coupled with the receipt of quit rent by the Crown, and the survey made in 1822 by *Nicholas Devine* and the Government Surveyor *Mayne*, having with him a Government chart or map, as was proved by the witness *Davis*, there is surely some evidence to go to the jury, as to the identity of the lands and as to the probability that possession was given to *Nicholas Devine* by the Government officers at or soon after the time of the grants in conformity with them, by which the grants, though imperfect on the face of them, might be made good. Besides which, their lordships are of opinion that from the long possession of these lands, the Jury would have been justified in presuming not a substitutional but a supplementary and confirmatory grant by the Crown. It was competent to the Crown to make such a confirmatory grant, and it appears from the case of *Goodtitle v. Baldwin* (51) that the Court will direct a jury to presume in favour of possession against the Crown any grant which might be legally made, the refusal to direct such a presumption in that case proceeding entirely from an express prohibition in the statute 20 Charles II. Their lordships, under these circumstances, are of opinion that the grants in question are not wholly void and incapable of being supported by the evidence adduced, and that the questions as to the identity of the lands partially and imperfectly described in them, and of the presumption of a confirmatory grant, ought to have been submitted to the Jury, not meaning to say that the Jury were bound

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to find for the plaintiff, but that the case he had made was proper for their consideration. This being so, and supposing that the plaintiff might have succeeded if the defendants had not set up any title in themselves, it remains to be considered whether the verdict establishing the title which they did set up can be supported. The defendant's case rested on an alleged conveyance of *Nicholas Devine to Rochfort* (under which the defendants claimed) in 1827. Much argument was raised both in the Court below and before their Lordships, as to a question of estoppel; but their Lordships agree with the Court below that such question did not arise upon the plaintiff's case; and when the defendants came to their answer, they themselves claimed, through *Rochfort* and *Nicholas Devine*, under those very grants as to which it was contended that they were estopped. It follows that the question of estoppel did not arise on their case; nor did they, by entering on their own case, waive the objection to the grants which was reserved to them on the close of the plaintiff's case. Two objections are, however, insisted on by the counsel for the plaintiff, namely, the admission of improper evidence, and a supposed misdirection by the learned Chief Justice in his summing up to the jury.

As to the first, a person of the name of *Maher* (one of the alleged witnesses to the conveyance) being dangerously ill, was examined upon interrogatories after the commencement of the action, and denied that he had witnessed the conveyance, and swore that the name of *Maher* appearing as that of a witness on the deed was not in his handwriting. He was asked by the attorney attending on behalf of the defendants to write his name, and he did so three times. The witness *Maher* died before the trial, at which time all the other witnesses to the conveyance were also dead. At the trial the defendants gave evidence of the handwriting of *Maher* and the other witnesses to the conveyance by calling persons professing to be acquainted with their handwriting, but did not put in the examination of *Maher* taken on interrogatories. The counsel for the plaintiff, in reply, put in that examination returned by the officer who took it, in order to prove *Maher's* denial of his alleged signature. The officer had not returned with the examination the signatures which *Maher* wrote at the request of the defendant's attorney, but the attorney produced them in Court, on the requisition of the learned Judge, in the course of the defendants' case, and swore to them. The learned Judge afterwards submitted these three signatures to the jury, in order that they might compare them with *Maher's* alleged signature on the deed, to which the counsel for the plaintiff objected.

Another witness to the deed, of the name of *Egan*, being also dead, the defendants gave evidence of his handwriting, and, having called his daughter to prove his death, she, on her cross-examination by the plaintiff's counsel, denied that the name of *Egan* on the deed was her father's handwriting. She spoke of a letter from her father to her mother, which she (the witness) had; and, on the requisition of the learned Judge, she produced it in Court, and the learned Judge handed it to the jury, in order that they might compare it with *Egan's* alleged signature to the deed, to which the counsel for the plaintiff objected. Now, as to this letter of *Egan*, it was not in any way in evidence in the cause; the jury could not have it before them for any other purpose than for a comparison of handwriting. Their Lordships are of opinion that, under such circumstances, it was not admissible in evidence, and ought not to have been handed to the jury. The several cases in our Courts establish this to have been the law until it was altered by a recent Act of Parliament. Little stress seems to have been laid on this matter in the arguments in the Court below, but their Lordships think it proper to express their opinion upon it.

The signatures of *Maher* stand on a different ground. They may in some sort be said to have been evidence in the cause. Their Lordships have no doubt that if on a trial at *nisi prius* a witness had denied his signature to a document produced in evidence, and upon being desired to write his name had done so in open Court, such writing might be treated as evidence in the cause, and be submitted to the jury, who might compare it with the alleged signature to the document. The three signatures of *Maher* in question were made by him when he was properly under examination as a witness in this cause; and although they were not returned by the officer who took that examination, yet they were sufficiently identified, and their Lordships are of opinion that they may fairly be treated as evidence in the cause, that they were admissible, and were properly submitted to the jury. Their Lordships have thought it right to express their opinion upon this question as to the admissibility of the letter of *Egan* and of these signatures of *Maher* for the guidance of the Court below, though it was not absolutely necessary, by reason of the opinion which their Lordships are about to express with regard to the other objection taken by the plaintiff's counsel. If any Act of the Colony similar to the recent Act of Parliament above alluded to shall have been passed before the new trial in this action is had, the Court will of course be guided by the provisions of that Act.

The second objection was that the learned Judge in his charge to the jury told them in substance that they must try the question as to

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whether the alleged conveyance was forged, in the same manner as if *Rochfort* had been on his trial for forgery. The learned judge explains that this direction was accompanied with explanation and qualification; but their Lordships cannot but think that the jury understood the direction as above stated. Now there is a great distinction between a civil and a criminal case when a question of forgery arises. In a civil case the *onus* of proving the genuineness of a deed is cast upon the party who produces it and asserts its validity. If there be conflicting evidence as to the genuineness, either by reason of alleged forgery or otherwise, the party asserting the deed must satisfy the jury that it is genuine; the jury must weigh the conflicting evidence, consider all the probabilities of the case, not excluding the ordinary presumption of innocence, and must determine the question according to the balance of those probabilities. In a criminal case the *onus* of proving the forgery is cast on the prosecutor who asserts it; and unless he can satisfy the jury that the instrument is forged, to the exclusion of reasonable doubt, the prisoner must be acquitted.

Now, the charge of the learned Judge appears to their Lordships to have, in effect, shifted the *onus* from the defendants, who assert the deed, to the plaintiff, who denies it; for, in substance, it tells the jury that whatever be the balance of the probabilities, yet, if they have a reasonable doubt, the defendants are to have the benefit of that doubt, and that the deed is to be established even against the probabilities in favour of the doubt. Certainly, it has been the practice so to direct the jury in a criminal case, whether on motives of public policy, or from tenderness to life and liberty, or from any other reason, it may not be material to inquire; but none of those reasons apply to a civil case. If, indeed, by the pleadings in a civil case, a direct issue of forgery or not be raised, the *onus* would be on the party asserting the forgery, and this would be more like a criminal proceeding; but even then the reasons for suffering a doubt to prevail against the balance of probabilities, would not, in their Lordships' opinion, apply.

Their Lordships cannot but think that this misdirection of the learned Judge was calculated materially to influence the verdict of the jury; and they must, therefore, hold that it entitles the plaintiff to a new trial, having already expressed their opinion that the plaintiff, on the close of his own case, was entitled to have it considered by the jury upon the points above stated.

Their Lordships will, therefore, humbly recommend to Her Majesty that a new trial in this case should be granted generally, and that the costs of this appeal, and also those in the Court below, should abide the event of such a new trial.

I think it right to mention that since their Lordships made up their minds in this case, and since this judgment was written, and which could not therefore influence their Lordships' judgment, there has been discovered at the Colonial Office here a map, and a printed book or index of names referring to the map, of the different grantees of land in the Colony, and there is the name of *Nicholas Devine* for 210 acres; and the index refers to the map and the plots of ground, and there it is upon the map marked out in metes and bounds distinctly and clearly as the plaintiff's lands; and that tallies with what is found in the evidence, that the Government Surveyor had gone over the ground with *Nicholas Devine* in his lifetime with the Government map. Now why that Government map was not produced at the trial, why it was kept back we cannot tell; but it does seem very extraordinary that such a thing should have occurred, to say the least of it.

Sir F. Kelly. We are greatly indebted to your Lordships for this last piece of information. No doubt what has been discovered at the Colonial Office will now be made evidence.

New trial granted. Judgment below reversed.

1855.

DOE
dem.
DEVINE
v.
WILSON.

*Privy
Council*

1852.

Ex parte ANDERSON. (1)

July 14.

Stephen C.J.
Dickinson J.
and
Therry J.

Small Debts Act—10 Vic., No. 10, sec. 9—*Splitting D'mands*.

Whenever a man has claims against another at any one time, each separately less than £10, but of which the aggregate is above that amount, the latter is to be deemed his "cause of action," and the bringing of separate actions in the Small Debts' Court is a violation of the statute, s. 9.

THE reserved judgment of the Court was delivered by—

THE CHIEF JUSTICE. This was an application for a Prohibition, to restrain execution on three Judgments against *Anderson*, in the Small Debts' Court jurisdiction, at the suit of *Jenkins*, pronounced by the Justices at Bathurst. The ground on which the writ was sought, is an alleged excess of jurisdiction, the plaintiff *Jenkins* having, it was suggested, split one cause of action into three, contrary to the express provisions of the Small Debts' Act, for the purpose of suing in the local Court. On the argument before us, in the last Term, two conflicting English decisions were cited, and from the very embarrassing and unsatisfactory way in which the affidavits, on either side, are framed, we found great difficulty in collecting the facts. We therefore reserved our judgment, which circumstances, beyond our control, have prevented us from delivering at an earlier period.

It appears plainly enough, that there have been in the whole *four* actions instituted against *Anderson*, before the Bathurst Court, at the suit of *Jenkins*, all being to recover back moneys paid, or alleged to have been paid, by the latter, for the purchase of undelivered wheat. But whether there were or not in all those cases, different contracts, or whether in fact four distinct sums of money were paid we really cannot ascertain. The first action was for £10, said to have been paid in "*or about*" December, 1850. But this case, which was tried on the 1st March last, has been settled. The three other actions were then commenced, one being for £8 1s. 6d., and the others for £10 each. The defendant *Anderson* does not swear, that any two of these form part of one contract, nor even that, in point of fact, any one cause of action has

(1) *The Sydney Morning Herald*, July 16, 1852.

been divided. The objection is stated by his attorney only, and the latter swears, simply, to what he objected before the Justices. That is to say, that it was "*evident on the face of the complaints*," that the cause of action had been divided.

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If the case rested there, we should unhesitatingly now dismiss it, for we can find nothing, in the complaints or summonses, to show any fact of the sort. Different dates are assigned, in each of the three actions, and different parcels of wheat. We are led to suspect no doubt, that one of these three arises out of the contract, which formed the subject of the settled action. But even on that point, we find nothing certain. The plaintiff in these actions is equally indistinct. He specifies however, three contracts only, and three payments, of which, *two are above ten pounds*. And he says not one word about the first (or settled) action, which, therefore, we presume sprang out of the same contract, and payment, as one of the three last actions. If so, there was, as to that one action, a clear splitting of a cause of action, in violation of the enactment in that behalf, being s. 9 of the Small Debts Act, *Call*. 1642. And if, in either of the actions, the plaintiff intended to abandon the excess above ten pounds (as by the old Act he was allowed to do), there was still a violation of the enactment; for, by the new Act, it would seem, there can be no such abandonment. Where the cause of action, in any one case, is above ten pounds, the Petty Sessions' jurisdiction would appear, by the 10 Vic., No. 10, to be altogether excluded.

But the difficulty we should have felt upon the affidavits, had the case rested on either of those objections, would have been insuperable. For how could we have determined, that there was a splitting of the cause of action into two, in any of the four actions; and, although the suing on a cause of action exceeding ten pounds might be clear, how should we ascertain in which of the last three the error was? We are relieved of these difficulties, however, by the decision in *Aykroyd's case* (2); by which, as we conceive, it must now be taken to be the law, that whenever a man has claims at any one time against another, each separately less than ten pounds, but of which the aggregate is above that amount, the *latter* (because constituting the then actual debt) is to be deemed his "cause of action," and the bringing of separate actions, for the items and matters originally forming distinct ten pounds debts, is a splitting of that cause of action, and consequently a violation of the enactment. On this broad ground, so much more extensive than the one taken, the Prohibition asked for must

(2) 1 Excheq. R. 479.

1852. issue, whether the three actions sprang out of one contract, or are
Ex parte really founded on separate payments and separate contracts. For the
ANDERSON. plaintiff's total claim (and therefore his cause of action) at the time he
Stephen C.J. sued, was not £10 merely, but £28 12s. 6d., which, according to the
case cited, he was not then at liberty to divide.

We have carefully looked into that case, and *Rex v. the Sheriff of Herefordshire* (3), which it overrules, and have compared the English enactment, on which the decision in the former case turned, with the one here in question, and we confess that we are unable to distinguish them. The Prohibition, therefore, is necessarily granted.

(3) 1 B. & Ad. 672.

REGINA v. ELLIS. (1)

1852.

*Criminal information filed by Crown Prosecutor—Prosecution by Attorney-General
—Arrest of judgment—Special demurrer—Doubtful finding by Jury*

July 16.

Stephen C.J.
Dickinson J.
and
Therry J.

It is no objection to a conviction, that the information was filed by a barrister, under a commission to act as the deputy of the Attorney-General, and the prosecution conducted at the subsequent session by the Attorney-General.

An objection to an information, that it charges several assaults as one, should be taken by way of special demurrer, and not in arrest of judgment. (*R. v. Waters* (2), followed.) It is the duty of a Judge to endeavour, by questioning the Jury, to arrive at their *real* meaning in cases where that meaning seems doubtful.

SPECIAL CASE. The prisoner had been indicted under an information by *T. Callaghan*, Esq., barrister-at-law, acting by commission as the Attorney-General's deputy during the preceding session, charging her with assaulting one *Isabella M'Evoy*, with circumstances of aggravation. The evidence went to prove a series of very aggravated assaults during two years. The jury found a verdict at first of not guilty, but with such evident confusion as to what they were about, that His Honor, the *Chief Justice*, questioned them as to their intention, and put the points at issue distinctly, by which means it was ultimately found that their intention was to find the prisoner guilty of assault, without the attendant circumstances of aggravation, and this finding was the one recorded.

Three objections were taken and reserved, and—

Purefoy, for the prisoner, now moved, first, that the authority of Mr. *Callaghan* was a temporary one, extending only over the Assizes, at which he acted in place of the Attorney-General; and, consequently that an information of his could not be taken up and prosecuted by the latter. Secondly, that the information, charging a number of assaults as one assault, was bad. Thirdly, that the *Chief Justice* ought not to have interfered with the finding of the Jury, but simply to have had placed on record the precise terms of the finding.

The *Attorney-General* was not called on.

Their Honors held that the conviction was good. The information filed by Mr. *Callaghan* was filed by him in his capacity as the officer

(1) *The Sydney Morning Herald*, July 19, 1852. (2) 1 Denison 361.

1852.
REGINA
v.
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for the time being performing the functions of a grand jury. This duty, and the appearing as counsel for the Crown to prosecute such information, were distinct, and it was in the latter capacity that the Attorney-General had acted in the present instance. As to the second point, it had been settled by the case of *The Queen v. Sarah Waters* (2), that any point which might have been taken advantage of by way of special demurrer should not be effective in arrest of judgment. Even, therefore, if special demurrer would have availed here (upon which point, their Honors were not quite agreed) the objection would not thereby be assisted, and as it was one not the substance of the charge, but merely to form, it could not be sustained. As to the third point, their Honors were unanimous in the opinion, not only that it was the duty of a Judge to endeavour, by questioning the Jury, to arrive at their real meaning in cases where that meaning seemed doubtful; but that it was highly inexpedient for counsel to tax a Judge in open Court with having acted erroneously, unless the question was too clear to admit of doubt, the proper course being simply to request a reservation of the objection relied upon for the opinion of the supreme tribunal.

Conviction affirmed.

(2) 1 Denison 361.

M'DONALD v. ELLIOTT AND ANOTHER. (1)

1852.

Oct. 26.

Stephen J.
Dickinson J.
and
Therry J.*Costs—Certificate to deprive of costs—43 Eliz., c. 6—Circuit Courts.*

The Judge presiding over a *Circuit Court* has no power to grant a certificate to deprive plaintiff of costs, as at *Nisi Prius* in Sydney, the Circuit Courts being distinct tribunals.

The statute 43 Eliz., c. 6, even if in force, has been virtually repealed by the practice established under the present rules of Court.

(*Per the Chief Justice*) The 43 Eliz., c. 6, never was in force in the Colony.

MOTION to set aside a certificate to deprive plaintiff of costs, granted by His Honor, Mr. Justice *Dickinson*, at the trial of the Goulburn Circuit Court.

Darvall, for the applicant. The Judge has no power to grant the certificate under the Law Simplifying Act (2), and it cannot be supported by the 43 Eliz., c. 6, because this statute is not in force in the Colony, as is proved by the repugnant provisions of the local Act, 5 Vic. No. 9.

The *Attorney-General* and *Purefoy contra*.

Their Honors granted the application, but without costs. It was unnecessary to decide as to whether the statute of Gloucester, and 43 Elizabeth, were in force, for the Courts here had made and established rules for determining all questions as to costs, which rules had the force of statutory enactments, and even if the statute of Elizabeth was in force, would virtually have repealed it, so far as it was inconsistent with the practice thus established. To these rules, therefore, reference must now be had, and upon their bearing must the present case be determined, unless it was found that the case had been taken from without their operation by special enactment. Now, although, by the amended Court of Requests Act, which established the enlarged jurisdiction of the tribunal which it referred to, such a power as that exercised by the learned Judge in the present instance had been expressly conferred; this had been repealed without any substituted provision of the like nature: for the

(1) *The Sydney Morning Herald*, October 27, 1852.

(2) 12 Vic., No. 1.

1852. Law Simplifying Act gave such a power only in cases tried before the Supreme Court, and the Circuit Courts were unquestionably distinct tribunals. This was no doubt an accidental omission, and their Honors regretted being compelled to arrive at the conclusion that such a certificate could not be granted by a Judge on Circuit as that which had been granted in the present case; but they were unanimous in this view. The *Chief Justice* was further of opinion that this statute of Elizabeth had never been in force here at all. The English statutes not expressly adopted would only come into force by their applicability to the circumstances of the Colony. The statute of Elizabeth had been made to provide against the extensive costs incurred by suits before the Courts at Westminster, and to enforce the prosecution of minor suits in the inferior tribunals, of which there were so many in England. Here, on the contrary, at the time when the Supreme Court was established, and for some years afterwards, there was no other Court than this in which a suit could be commenced, and it could not be assumed that suits before that tribunal must necessarily be expensive. Subsequently, when a tribunal of inferior jurisdiction, the Court of Requests, was established, and when under ordinary circumstances it might have been contended that the statute of Elizabeth would come into force, the very Act of Council which created this jurisdiction contained enactments so totally at variance with the provisions of that statute as to destroy the argument of its being in operation.

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[IN EQUITY.]

CLARKE AND OTHERS v. TERRY AND OTHERS. (1)

1853.

July 5.

Will—Codicil—Construction—Intention of republication—“All my real estate not specifically otherwise disposed of”—*Court of Claims, principles to guide—*5 Will. IV, No. 21, and 4 Will. IV, No. 9—*Crown grant in trust—Resulting trust to the Crown—Costs.*

Stephen C.J.
Dickinson J.
and
Therry J.

A codicil, referring to, and confirming the will, or a previous codicil, is equivalent in general to a republication of such will or previous codicil. Where a codicil recites that the testator had, in his will, devised *all his real estate not specifically otherwise disposed of*, and then gives the *same* real estate, in a certain event, to new parties, the words used do not indicate an intention of republication, but the reverse. (*Strathmore v. Bowes* (2) followed.)

The Commissioners for investigating claims to hand, under 5 Will. IV, No. 21, cannot decide or report on the same, on any other than the same principles, which govern Courts of Law, when a question of *construction* arises.

Where a grant was made in accordance with the report of the Commissioners to trustees “to the *several trusts and uses* declared in a certain will, the terms of which cannot be held to apply to the land granted, the land must be taken to have reverted to the Crown, as on a resulting trust.

Costs (following *Walker v. Webb* [3]) allowed to neither side, on the discharge of a rule *nisi*, the respondents having succeeded in form, but substantially failed.

THE facts and arguments in this suit appear in the reserved judgment of the Court, delivered July 5, by—

THE CHIEF JUSTICE. This is a proceeding in equity, by Rule *Nisi*, (under our local Act in that behalf,) in which *John Hosking* and his wife, and the trustees under a certain settlement, executed by them in favour of herself and her appointees, are complainants, and *Rosetta Terry* and others, some being the devisees under the will of *Samuel Terry*, and the others persons more or less interested under that will, are respondents. The said devisees, in that character, have obtained from the Crown a grant of certain land at King’s Plains, near Bathurst, which Mrs. *Hosking* claims as heir-at-law, or as the heir of her brother, his only surviving son. And the object of the suit is, to cause them to be declared trustees for her, and her appointees, of that land, and to compel them to convey it accordingly.

(1) *The Sydney Morning Herald*, April 23, July 7, 9, 1853; and cited 9 S.C.R., Eq. 127; 9 S.C.R., App. 16. (2) 7 T.R. 486, and 2 B. and P. 505. (3) *Ante*, p. 253.

1853. The land was purchased by *Samuel Terry*, from one *Jamieson*, the original *locatee*, or promisee from the Crown thereof. It is not disputed, therefore, that the testator, had he lived, would have been entitled to (or would, as a matter of course, have obtained) the grant of the property, and the heirship of Mrs. *Hosking*, as the representative of her brother, is admitted. The facts, moreover, that this land is not specifically mentioned, either in the testator's will or codicils, that he acquired it after the date of his second codicil, and that the testator died before the late alteration in the law respecting wills, are unquestionable. But the respondents resist the claim, on two grounds. First. They maintain that the will was in effect republished, by the operation of the testator's last codicil. Secondly. If not, yet that the claim is effectually barred by the grant. They contend, that the Crown was not bound to give the land to a person claiming, as Mrs. *Hosking*, they say, does, by virtue of technical and arbitrary rules merely; but that it was entitled, looking at all the circumstances, to consider what was the probable intention of the testator, and whether he meant to die intestate as to this property, and to decide accordingly.

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The arguments on this second point, one of very great general importance, will be stated more at large hereafter. We confine ourselves, in the first instance, to that which affects the question of the devise.

By his will, the testator devises his residence in Sydney, and all other his property there and in Liverpool, then *or thereafter* to be possessed by him, to his wife for life; with remainder in fee, respectively as to certain properties in Liverpool, to his son *John*; as to premises in Pitt-street, Sydney, to his daughter; as to other premises there, to *Esther Marsh*; as to his own residence, to his son *Edward*; and, as to his property in George-street, and other property in Sydney, and in Liverpool, not specified to his other children. He gives two estates called Coberty and Redmine to *Henry Marsh*; Hoxton Park, and the Wheat Sheaf, to his son *John*; and all his land at Bathurst, the Five Islands, and Eastern Creek, with Boxhill, Mount Pleasant, and all other his farms and lands, not otherwise thereinbefore disposed of, to his son *Edward* in fee tail.

If, therefore, according to the general rule on the subject of republication, this will, or the second codicil, on which the respondents rely, be made to speak as on the date of the *last codicil*, at which period the testator had acquired the estate in contest, there are here, unquestionably, as there are also in the said second codicil, ample words to include it.

We now come to the codicils. On the first of these, nothing what-
 over turns. By the second, the testator revokes the several bequests
 to *Edward*, and gives all the property which he had by the will devised
 to him, (including *all the testator's estates not otherwise disposed of*
by his will, or by that codicil,) to trustees, being the respondents, the
 grantees from the Crown, in trust for the same *Edward*, for life, and
 then for his heirs, with remainder to the testator's own right heirs.
 The devise adds, on the same trusts, (after the death of his wife,) all
 the testator's houses in Sydney, not specifically otherwise bequeathed.
 To the same trustees, the testator gives three houses in Pitt-street, and
 an estate called Macquarie Field, in trust for his daughter for life,
 with similar remainders, for her and his own right heirs. And he gives
 to a nephew some property in Sussex-street, and to two grand-nephews,
 respectively, properties at Yass and Surry Hills. A clause follows, in
 express terms republishing the will.

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Then came the testator's purchase from *Jamieson*; and, shortly after-
 wards, his third and last codicil. By this, the testator gives his residence,
 which previously was devised to her for life only, to his wife in fee.
 He gives to *Edward*, in fee, a house in Castlereagh-street, Sydney; and
 to his daughter three houses in Pitt-street (the same, apparently, which
 the second codicil had vested in trustees for her, for life) and the estate
 called Macquarie Field in fee. Lastly, after reciting that he had
 given *all his real estate, not specifically otherwise disposed of*, upon
 trust for *Edward* for life, and then for his heirs, with remainder to his
 own right heirs, the testator revokes *such part of the said bequest as*
relates to his own right heirs, and gives *the same real estate*, in the event
 of his son's death without issue, to the children of three persons named,
 as tenants in common.

The question then is, on this part of the case, the son having died
 without issue, do the words "all my real estate not specifically other-
 wise disposed of" indicate, as used in the last codicil, merely the
 residue which *Samuel Terry* had, in fact, by the previous codicil,
 devised, as property not specifically disposed of, to the trustees named,
 or shall those words by virtue of the rule as to the effect of republi-
 cation, and the rule that ordinarily a codicil amounts to republication,
 be taken to indicate the testator's then undisposed of residue, including
 therein, of course, all lands acquired since the date of the previous
 codicil.

The former of those alternatives was maintained, on behalf of the
 heir-at-law, by Mr. *Foster*, Mr. *Broadhurst*, and Mr. *Darvall*; and the
 latter of them, for the respondents by the *Solicitor-General*, Mr.

1853. *Donnelly, and Mr. Fisher.* On the one hand it was contended, that an intention not to enlarge the residue, by any addition of after-acquired lands, was apparent; that, obviously, the real estate which the testator devised, by his second codicil, could only be that which he then possessed; and that, in express terms, the devise in the third only affected "*the same*" estate; that the intention was, simply, to effect an alteration in the ultimate disposition of that property; and that, had the testator meant more, he would doubtless have republished the former codicil in distinct words; that there were here no general words, the effect of which might have been, *per se*, to induce a republication; that testators are supposed to be cognizant, and, if not, wills must be continued, as if they were cognizant, of the rules of law which affect them; but that, in this case, the second codicil disclosed in fact a knowledge of these rules. On the other hand, the effect of the mere making of the codicil was relied on, as in itself a republication of the will and previous codicil, unless a contrary intention could be shown clearly and beyond all doubt; but it was insisted, that to suppose the existence of such an intention, in this case, would be most unreasonable; that the alteration introduced by the last codicil was obviously as applicable to the newly-acquired lands, as it was to any or those possessed originally; that the testator, it seemed clear, never meant to die intestate as to any of his property; that, when he used the words all my estate, the testator doubtless spoke, or meant to do so, of all which then constituted his estate; and that, at all events, he could not have contemplated his son's taking as *heir*, unrestricted and without limitation, in the face of provisions such as the testator was then making, any portion of that estate.

The following cases and authorities were cited. *Barnes v. Crowe* (4); *Pigott v. Walker* (5); *Strathmore v. Bowes* (6); *Goodtitle v. Meredith* (7); *Williams v. Goodtitle* (8); *Potter v. Potter* (9); *Esdaile v. Lund* (10); *Doe v. Marchant*, (11); *Chambers v. Brailsford* (12); *Cole v. Scott* (13); *Hughes v. Turner* (14); *Ford v. Ford* (15); *Monypenny v. Bristow* (16); and sundry passages in *Pow. on Devises*, and *Jarman on Wills*, title Republication.

We have considered these cases, and the arguments of the learned counsel; and we are of opinion, that there was here no republication of *Samuel Terry's* will and codicil, or either of them, by the final codicil, and consequently, that the land in dispute, (or the testator's rights and

(4) 1 Ves. 486. (5) 7 Ves. 118 and 124. (6) 7 T. R. 496 and 2 B. & P. 505.
 (7) 2 M. & S. 5. (8) 10 B. & C. 895. (9) 1 Ves. Sen. 442. (10) 12 M. & W. 612. (11) 6 M. & G. 825. (12) 2 Meriv. 25. (13) 1 M. & G. 527.
 (14) 3 Myl. & K. 666. (15) 6 Hare, 492. (16) 2 Russ. & M. 132.

interests therein whatever those were,) descended to the son as his heir-at-law. The principle is not intended to be questioned, that a codicil, referring to and confirming the will, or a previous codicil, will be equivalent in general to a republication of such will, or previous codicil; and that the whole, in such case, will be considered as incorporated, and together forming but one will. The effect of the decisions, in the cases by which that principle has been established, is stated by Lord *Ellenborough* in *Goodtitle v. Meredith* (17). It is, "to give an operation to the codicil *per se*, and independently of any intention, so as to bring down the will to the date of the codicil, making the will speak as of that date, unless, indeed, a contrary intention be shown; in which case, it will repel that effect." Fully recognising the law to be as thus explained, we consider the case of *Strathmore v. Bowes* (18) to be conclusive, that words such as those which the testator has here used, are to be taken as indicating that contrary intention.

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The codicil, on which the question in *Strathmore v. Bowes* turned, after reciting that the testator, by his will, had given *all his lands and hereditaments*, on certain trusts therein mentioned, to six persons, revoked that devise so far as it related to two of them, and then gave *his said lands and hereditaments* to the other four, on the same trusts; and it was held, that those words showed an intention not to extend his will, but to confine its operation to the lands which he had, at the time of the making of the will. No decision, we think we can venture to say, has ever trenchd on the authority of that case; and we are unable, after a careful consideration of the arguments there urged, and of the grounds on which the judgment in it was rested, first in the Court of King's Bench, and afterwards in the House of Lords, to distinguish that case in substance from the present. Mr. Justice *Grose* there observed, that the codicil gave the *said lands*, on the same trusts as those on which the testator had devised the same, previously, by his will; but that "he had not before devised *the lands in question*, for he had them not at the time of making his will." To the same effect are the observations of Lord *Eldon* in the report in 2 B. and P. 506-7. The observations equally apply here. The codicil of Mr. *Bowes* recites a devise of *all his lands and hereditaments*. The codicil before us recites, that the testator had devised *all his real estate not specifically otherwise disposed of*. The former then proceeds, by giving his *said lands and hereditaments* to new trustees. The latter gives the *same* real estate, in a certain event, to new parties. We cannot see any material difference, as to the point in debate,

(17) 2 M. and S. 5.

(18) 7 T. R. 486, and 2 B. and P. 505.

1853. between these two instruments. For it is equally true of the one, as of the other, that the testator could not by his will, (or previous codicil,) have devised any lands which he then had not to devise. And if, by using the word *said* in the former case, the testator was rightly deemed to have intended a restriction to the lands so possessed, and therefore so devised, the like intention must, we think it clear, be attributed to the testator, by reason of his use of the word *same* in the present case. The argument is much strengthened, as in *Strathmore v. Bowes*, by referring to the clause of *revocation*. Each testator revokes the old, preparatory to making the new devise. But, as was suggested by Lord *Eldon* in the passage already referred to, how could the testator *revoke* a devise, which obviously, he never could have made? The context, therefore, strongly supports the conclusion arrived at, that the testator in this case referred only to lands, which he had previously devised; that he revoked that devise, in order to accomplish what followed; and that he thereby showed, conclusively, an intention to exclude all lands not the subject of that devise.

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It occurred to us that a distinction might be made, possibly, between this case and *Strathmore v. Bowes*, by reason of the devise here relating to a *residue*; and that, as the testator had altered that residue in identity, by specifically taking out of it one property, at all events, if not more, it was impossible to hold that the *diminished* residue was, in truth, the "same estate" as the one previously given. But on full consideration of this point, we think that it cannot help the respondents. For although it is certain, that, under such circumstances, the residues are in *quantity* not the same, yet this circumstance affects in no degree the reasoning, on which the decision in *Strathmore v. Bowes* is founded. Explained by the context, there ceases to be any difficulty. The testator gives to his son, a cottage which had previously formed part of the residue, or unenumerated properties, devised to the trustees. He recites that he had by the previous codicil, in a particular way, devised all that residue. And then (as to its ultimate object) revoking that devise, the testator gives "the same" residue to the trustees, upon a newly-declared trust. Taking the whole of this together, the meaning is plain. He alters the trust, in respect of the same unenumerated properties as before, *less* the one then specially deducted.

The question has now to be considered to what extent and in what manner Mrs. *Hosking's* rights are affected, by the issue of the Crown grant. The respondents contend, as we have already noticed, that any such rights are thereby wholly barred. It was suggested, that possibly the Crown was entitled to give the land, in

its discretion ; and if so, obviously she would have no claim. But, assuming that the Crown was bound to grant, in cases of this kind, to the parties representing, or believed to represent, the original promisee of the land, the Crown had here by its officers investigated the title, and issued a grant to the trustees of the will, in the discharge (or, at least, the intended discharge) of that duty. In deciding who were the parties entitled, the Crown was not fettered by technical rules ; and, if those were rejected, there could be no doubt that it had decided rightly. But, if its decision was wrong, the consequence would be, not that the trustees were to transfer to the complainants, but that, as there would be *no such trusts* as those supposed, the grant would either be void, or there would be a resulting trust, now existing in the Crown. For this, *Lewin on Trusts* 134 to 137, and cases there, were cited. On behalf of the complainants, on the contrary, it was urged that *Terry's* trustees, by representing themselves to be the parties entitled, and accepting the grant made to them as so entitled, had become virtually trustees for the real owners, or those who ought to have been thereby *made* the owners of the disputed property ; and that they ought to be decreed, accordingly, to convey it to the trustees of *Mrs. Hosking*, the only parties entitled thereto.

Before proceeding to deliver our judgment on this part of the case, it will be convenient to notice the provisions of the Act 5 Will. IV, No. 21, and to set out the material parts of the grant in question, which, it appears was issued under the authority of that Act. The first section recites a previous statute, the 4 Will. IV, No. 9, and that its provisions had been found beneficial, in settling *disputed claims* to grants of land, and that it was expedient "to renew the same, with certain alterations" ; and then it enacts that the Governor may appoint three Commissioners, "for examining and reporting upon" all claims to grants, or applications for grants, which should be referred to them. By s. 3, these claims are more specifically described, as the claims of persons "to have grants of land in due form executed to them, in performance of the promise of any Governor" of the Colony ; and the Commissioners are to report upon such claims, when referred to them by the Governor, for his information and guidance. By s. 4, the Commissioners are to be guided by the "real justice and good conscience of the case, without regard to legal forms and solemnities," and when satisfied that the person claiming "is *entitled*, in equity and good conscience, to hold the land, and *to have a grant* thereof" made to him, the Commissioners are to report the same ; but the Governor is, nevertheless, not to be thereby compelled to issue a grant, unless he shall think proper.

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The 4 Will. IV, No. 9, which had recently expired, contained similar provisions. It cited that many persons had obtained possession of lands, by the authority of the several Governors of the Colony, under promise of grants to be duly made to them; but that such grants had been unavoidably delayed, and the lands had come into the possession of others, claiming to hold them "as their just and lawful right" under the original possessors; and that, in many cases, it was impossible to produce such legal titles, as would enable the Supreme Court to take cognizance of them; and that it was necessary that a remedy should be provided, and grants be made to persons who had *the just right thereto*, obtained as aforesaid:—and then it authorised Commissioners, appointed by the Governor, to report upon all applications for grants, by persons holding or *claiming* to hold lands, under those who had originally obtained possession of them, under any such promise as aforesaid.

We pause here to observe, first that the Commissioners thus appear to have been appointed, not as a Court to hear and determine, but only in aid of the Governor, to assist *him* in determining, and, secondly, that the applications of parties claiming derivatively, from the original promisees of land, supposing the position of the former to be in point of fact established, are treated as matters of *right*. In other words, the Governor, as the agent of the Crown in that respect, is recognised as being bound to issue grants, in the name of the Crown, to those persons, and those only, who are entitled to represent such promisees. What shall be the remedy, in case the Governor decides erroneously, the legislature has not declared, and we are not now called on to determine. It is greatly to be lamented, that such a remedy was not specifically provided. This Court may, in some cases, very probably, be enabled to apply one. If, however, such important questions of law, as those on which the right of the devisees, or of the heir, depended in this case, and which may involve (as we understand is here involved) property to the amount of many thousand pounds, can be decided thus without correction or appeal, the law which has created such a state of things, one not existing with respect to any other tribunal, would clearly seem to demand revision. It was decided in this Court, in the case of *Walker v. Webb* by Mr. Justice *a'Beckett*, then Primary Equity Judge, that a person who has obtained a grant, on an erroneous recommendation of the Commissioners, may, under certain circumstances, be dealt with as a trustee, by implication, for the party really entitled, and be compelled to convey accordingly. But in that case there had been *concealment* practised, and there was a clause in the grant, not inserted in the present, saving the right of all parties other than the grantee.

Mr. Justice *a'Beckett* does not seem, indeed, to have rested his decision on that clause, and there are passages in the judgment, which imply an opinion that a similar decree might be obtained, even in cases such as this.

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On that very important question, since it is not necessary to do so, we intend here to offer no opinion. But we think ourselves called on to deny, notwithstanding the arguments advanced in support of the position, that the Commissioners for investigating Claims to Land can decide, or report on them, on any other than the same principles, where a question, at least, of *construction* shall arise, which govern Courts and Judges in such cases. The expressions used in the 5 Will. IV, s. 4, that the Commissioners are to be guided by equity and good conscience, without regard to legal forms and solemnities, (especially when read in connection with the previous Act, the recital in which shows the object of their introduction) do not imply more than this, that a perfect legal title, from the promisee, or his assigns, is not to be deemed necessary. The effect sought to be given to the enactment, it is clear, would render uncertain every question referred to these Commissioners, and subject all titles to the mercy of the loosest, and most vague and varying interpretation.

The grant in this case, dated the 5th April, 1839, recites it to be in fulfilment of a promise, made by the Governor, *Ralph Darling* to *Thomas Jamieson*; and that the present instruments conveying the lands on the trusts of the will of *Samuel Terry*, was in accordance with the Report of the Commissioners, appointed under the 5 Will. IV, No. 21:—And then Her Majesty, of her special grace, grants the land in question, to the trustees mentioned in the codicils, and their heirs and assigns, to hold to them and their heirs, “to the *several trusts and uses* declared in the will of the said *Samuel Terry*.”

We think, that these trusts may be understood, without much difficulty, to be those declared by the last codicil, on the principle already mentioned, that, after a republication, all the testamentary papers, combined, are taken to constitute one will only. But the “trusts and uses,” must, in our opinion, be taken to be those which are declared (or were supposed to have been declared) concerning the land forming the subject of the grant. And as, according to the judgment here expressed, that land was not included in the devise, there are no such trusts or uses existing. The land, therefore, we conceive, has reverted to the Crown, as on a resulting trust. If, however, the true construction of the grant be, that the land is given (whether it really passed by the will or not) on trust for *Edward*

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Terry, and in case of his death without issue, on trust for the parties in the last codicil in that behalf mentioned, then no doubt the question would arise for decision, whether the error into which the Crown has been led, in granting the property in dispute to persons not entitled thereto, could in such a case as this be corrected. In the view which we take of the subject, however, (though the question is one of great difficulty,) the remedy is here in the hands of the Crown. And, since the respondents have therefore nothing to convey, the application against them fails, and the Rule obtained by the complainants must be discharged.

On the subject of costs, we have felt much hesitation. The respondents have failed, wholly in maintaining any title to this land, under the will. They (or the trustees) have procured a grant of it notwithstanding, to be made to them. On the main point of contest, therefore, the question of title, the opinion of the Court is against them. On the other hand, the result of the particular proceeding is in their favour. Moreover, of the respondents some are trustees, bound to protect their *cestui que trusts*, entitled to protect themselves. And, in *applying* for the grant, at any rate, whether it be inequitable or not, in the eye of the law, to *retain* it, the trustees appear only to have done what they thought was their duty. It must be added, however, that with this propriety of conduct, or with the position of the respondents, the complainants have nothing to do; for, referentially to the land the parties litigant are strangers. The complainants, therefore, had their application succeeded, would have been entitled to costs. The cases are all collected, on this point, after argument, in *Walker v. Webb*; and that result is clearly deducible from them. But the respondents here, although they in form succeed, have substantially failed. We think, therefore, that we meet the justice of the case, and violate no principle or rule, by discharging the rule *Nisi* without costs on either side.

Rule discharged, without costs.

CORY v. MOFFIT. (1)

1853.

*Libel—Justification—For the public benefit—Amendment.**April 29.**Stephen C.J.
Dickinson J.
and
Therry J.*

The justification of a libel, on the ground that the publication thereof was for the public benefit, should state the reasons *why* it was beneficial.

(*Per the Chief Justice and Therry, J. ; Dickinson, J., dissentients.*) Where the Court on the argument of a demurrer is in a position to see what a proposed amendment would amount to, it is incumbent on them, for the saving of expense and delay, to say whether, when the amendment is made, the open statement of these facts might be alleged to be a statement for the public benefit.

A plea of "truth" and "for the public benefit," without any reason assigned, is made good by inserting averments that plaintiff was still a practising attorney at the time of publishing the alleged libel, and that there was a likelihood of his being employed by Her Majesty's subjects in matters of trust, if they remained ignorant of this delinquency, &c.

THIS was a demurrer to the defendant's plea. The action was for an alleged libel, charging the plaintiff, an attorney, practising chiefly at the Police Court, with having, in effect, combined with the Inspector of Nuisances to lay an information, under the Master and Servants' Act, against Mr. *Entwistle*, with reference to a case, wherein, to the plaintiff's own knowledge, there was, on the part of *Entwistle*, no moral delinquency, and by assuring the latter that he was certain to be convicted, causing him to pay a sum of money for plaintiff's fees, and for a fee to the Inspector of Nuisances. The plea avowed the truth of the alleged libel, and averred it was for the public benefit. This was demurred to on the ground that there was no allegation to show why, or upon what principle, it became for the advantage of the public to publish a statement of these matters. It was also contended that the publication of a single act of delinquency (assuming such to have occurred) was not advantageous to the public.

Their HONORS were unanimous in holding that the plea was bad for the omission already stated. Besides setting out the facts and averring that the statement of them was put forth in the alleged libel for the public benefit, the plea should go on to state the reasons *why* it was for the advantage of the public this should be done. There was a difference of opinion, however, as to whether, having thus decided, it was proper for the Court to go further and say whether, presuming

(1) *The Sydney Morning Herald*, April 30, 1853.

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there would be an amendment of the plea in accordance with the position assumed in argument, as to the plaintiff being an attorney, &c., the plea thus amended would be a good one. It was the opinion of the *Chief Justice* and *Therry, J.*, that, as the argument of the case had placed the Court in a position to see what the amendment, if permitted, would amount to, it was incumbent on them, for the saving of expense and delay, to say whether when this amendment was made the open statement of these facts might be alleged to be a statement for the public benefit; *Dickinson, J.*, on the other hand, admitting that although it came within the province of a Judge to pronounce a decision as to the value of a particular amendment when he arrived at a conclusion with reference to it, did not think it was obligatory on the Judge to do this, and not being obligatory, he thought it undesirable because the Bench was thus bound to an opinion without having had the particular question with reference to which it was pronounced argued so perfectly as it must necessarily be if it became the subject of a further demurrer after the amendment had been made. The decision of the majority of their Honors was that the plea would be rendered good by inserting averments that the plaintiff was still a practising attorney at the time of publishing the alleged libel, and that there was a likelihood of his being employed by Her Majesty's subjects in matters of trust, if they remained ignorant of this delinquency, consequently that this publication was necessary to put them on their guard, and, being thus necessary, it was a privileged statement made for the public benefit. Assuming that the facts were as pleaded, the case would undoubtedly, in a professional man, be one of great delinquency, and although it might seem hard that any one single act of this description should be made the means of destroying the practitioner's whole prospects, the interests and prospects of the individual must give way to the interests of the public generally. The argument was conclusive that if a professional man who might be thus employed in matters requiring high integrity had, *in his professional capacity*, been guilty of such conduct as was here pleaded, it must be for the advantage of those who might employ him that they should know it.

Leave was therefore granted to amend, but the amendment to be limited to the insertion of the allegations already alluded to.

Order accordingly.

[IN EQUITY.]

COOPER v. THE CORPORATION OF SYDNEY. (1)

1853.

*Injunction—Right to water of flowing stream—Occasional flow—Surface water—
Twenty years' enjoyment of easement—Limitation of powers given by an Act of
Parliament.*

June 8.
Sept. 28.
Stephen C.J.
Dickinson J.
and
Therry J.

The plaintiff sought to restrain the defendants from making a trench upon the Water Reserve, for the purpose of obtaining water from a swamp therein, on the ground that the trench would intercept water naturally flowing on to the plaintiff's land.

Held, that if the stream were temporary, and casual only, an overflow at times of the surplus water of the swamp, no right was vested thereby in the plaintiff, but if the stream were in a channel, between banks, continually or habitually so flowing, the water which would naturally reach the stream could not legally be abstracted, whether such water were underground or not.

The evidence on this point being contradictory, an issue was directed.

Quere, will twenty years' enjoyment of the flow, if *not* habitual, but casual and accidental only, give the plaintiff a right thereto, or will not the presumption of a Crown grant thereof be too violent to be adopted?

The Corporation, having the control of the water supply of Sydney, by 14 Vic. No. 41, s. 72, previously exercised by the Crown, under the provisions of the Water Tunnel Act, 4 Will. IV, No. 1, can have no right, which an individual in such a case would not have. The powers also expressly given by the Act, ss. 71 and 72 of 14 Vic. No. 41, must be taken to have *some* limit.

Every proprietor, and, in general, every occupier, by reason of his occupation, is entitled, as an incident to the property in the land, to the reasonable use of the water of any perennial stream, or, at least, of any such stream running in a defined course and channel, flowing through that land. And he is similarly entitled to have the stream continue so to flow, without any unreasonable use of its water, or of the water properly belonging to it, by any other proprietor or occupier.

THIS was a rule *nisi*, obtained at the instance of Mr. James Cooper, as agent of Mr. Daniel Cooper, owner of the Waterloo Estate, calling upon the Mayor, Aldermen, and Councillors of the city of Sydney, to show cause why they should not be restrained by injunction from proceeding to execute certain works, which they were about to enter upon at the water reserve, formerly known as the Lachlan Swamp. These works were the excavation of a trench at the gorge or narrow part of the Swamp, near its junction with the Waterloo Estate, for the collection of water with a view to its transmission to reservoirs for

(1) *The Sydney Morning Herald*, May 7, 12, June 9, July 14, Sept. 30, 1853.

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the supply of the city. The ground upon which the injunction was sought was that the works would injure the plaintiff by stopping the flow of water, which had hitherto, "from time immemorial," flowed from the Lachlan Swamp on to the Waterloo Estate. It appeared that the chief value of the estate was its copious supply of water, that there had been twenty-five years uninterrupted possession of the land and its water, that there were two wool-washing establishments there, one of which would be stopped, and the other much injured by the stoppage of the flow of water. The evidence of several civil engineers, put in on both sides, as to the diminution in the flow likely to be caused was contradictory.

On the assumption that the decision as to the facts would be sent to a Jury, the argument was directed chiefly to the question, whether the plaintiff was entitled to an injunction, or merely to a claim for compensation.

The *Solicitor-General* and *Darvall*, for the Corporation. The Government received the power to do anything and everything necessary for the water supply by the Act of Council, 4 Will. IV, No. 1, generally known as the Water Tunnel Act, and not merely for obtaining water from the Lachlan Swamp, but from all the swamps and sand-hills in the parish of Alexandria. This Act contained a provision for compensation to persons injured thereby. The City Corporation, created by 6 Vic., No. 3, received from the Government the whole of the works connected with the water supply, and as servants of the Government must be assumed to have all the necessary powers, though not expressly given them by the Acts of Incorporation. The swamp had been set aside for this express purpose.

Foster and *Broadhurst*, in support of the application. The powers of the Government under the Tunnel Act, 4 Will. IV, No. 1, have not been transferred to the Corporation, and there can be no delegation by implication. But the Tunnel Act did not give the power of doing everything that was necessary for *procuring* the water, irrespective of private rights, but merely the power of conveying it by the tunnel and distributing it.

Cur. adv. vult.

On June 8,—

June 8.

The CHIEF JUSTICE said that it had been the intention of their Honors to prepare a written judgment in this case, but the want of time, and the severe indisposition under which one of them (Mr. Justice *Therry*) had laboured, had rendered this impracticable. Looking at the extreme importance of the case, however, they deemed it

advisable to announce their decision at once, leaving a written and more formal judgment to be afterwards prepared, if it should be found necessary. They had been at first disposed to direct an issue, but after a careful consideration of the affidavits and of the cases, they had arrived at the conclusion that they were in a position to deal with the case at once, and without thus calling in the aid of a jury. In the first place, it was very doubtful whether this injunction ought to go at all. There were conflicting affidavits as to the nature and effect of the injuries or alleged injuries, and even if the applicant would be likely to sustain damages to the extent which he and his surveyors alleged, his remedy would be an action. The extent, in point of value, of the damage would admit of calculation. Suppose, for instance, the estate was rendered wholly worthless by this work of the Corporation, then the measure of damages would be the present value of the lands. In this way an estimate as to any difference in value could be made. But in the second place the Judges were clearly of opinion that the applicant was entitled to no redress of the kind now asked for. It was plain from the affidavits that there was no continuous and habitually running stream of water at the place in question which the Corporation was seeking to divert. All which the officers of the Corporation proposed to do was to dig a trench for the collection of water which percolated below the surface amidst the spongy vegetable matter of which this swamp was composed. This water was accumulated from the fall of rain, and was collected on the surface of lands lawfully held to the Corporation for the express purpose of procuring from thence a supply of that element for the city. There was indeed an occasional overflow, which assumed the aspect of a running stream passing from the land of the Corporation to that of the applicant. This, however, was only when there was a larger quantity of rain than usual, and the swamp contained a larger quantity of water than its spongy soil would retain. The surplus then flowed away on the surface. This flow was consequently a mere occasional excess or overflow of the sub-surface water, and not a running stream properly so called. Now it was established by the case of *Acton v. Blundell* (2), that the possessor of land was entitled to draw off to any extent the sub-surface water of the lands which he thus possessed. If the mere fact that some of this sub-surface water occasionally rose to the surface and overflowed could place the owner of the land in the same position as if the water in dispute was a stream continually running, it would follow that the right to draw off surface water would be destroyed, for no instance could be conceived in which such water

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1853. might not occasionally rise to and overflow the surface. It was clear, therefore, that even if this occasional overflow should be wholly prevented by the works which the Corporation were carrying out, their right to take this water would still be unaffected. It was unnecessary to go beyond the case of *Acton v. Blundell*, and to decide whether or not the applicant might under such circumstances have acquired a right to this overflow of sub-surface water from land contiguous to his own. The application must be dismissed, and with costs. Mr. Cooper, acting for an absentee proprietor, had done very right in bringing the matter before the Court, and even if the land were his own, every proprietor had a right to maintain the possession of every advantage to which he conceived himself entitled, but he had sought to obtain a species of aid or redress to which he had no legal claim, and must take the consequences.

Injunction refused.

June 9.

A rule *nisi* having afterwards been obtained, by which the Corporation was called upon to show cause why the case should not be reopened, both parties being permitted to give fresh evidence, on June 9,

Broadhurst, for the applicant, moved to make the rule absolute.

Darvall, for the Corporation. The application is totally opposed to the practice. The plaintiff should commence *de novo*.

Broadhurst. The object is not to produce new matter, but to render more plain and certain what had been already before the Court, namely, to show that there really was a continuous stream of water flowing on to the Waterloo Estate, on the spot where the Corporation proposed to cut their trench for the supply of city.

The Court granted the application. The proceeding was one which was not strictly analogous to any other, and in which the Court must establish a practice for itself. It approached rather to a new trial, in which each party, of course, could reshape his case as he pleased. As a condition precedent, however, plaintiff was to pay the costs of this motion and of the former hearing, and a time was to be fixed for the filing of the affidavits, the case coming on upon the first Wednesday in term.

On July 13,—

July 13.

Foster and Broadhurst, for the plaintiff, renewed the motion for an injunction upon fresh affidavits, wherein it was affirmed that, not only was the flow over the surface from the Lachlan Swamp to the Waterloo Estate continuous, but part of it flowed in a regular channel,

forming, in fact, a continuous and habitually running stream, that this channel commenced below where the Corporation proposed to cut their trench, and that the trench was between the commencement of the channel and the sources to the northward from whence its water was derived. In the case of *Dickinson v. The Grand Junction Canal Company* (3), as explaining *Acton v. Blundell* (4), was relied on.

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The *Solicitor-General* and *Darvall, contra*. The case cited is distinguishable from the present. The water is to be drawn above the commencement of the stream.

Our. adv. vult.

The reserved judgment of the Court was delivered, 28th September, *Sept.* 28. by—

The CHIEF JUSTICE. On the former hearing of this case we expressed the opinion that there was no evidence, or no clear and sufficient evidence, especially when contrasted with that adduced by the respondents, of any continuous and habitually running stream, which was sought to be, or which would or could be, diverted by the proposed works of the Corporation. It appeared to us, on a review of the affidavits on both sides, that there was only an occasional overflow, forming a temporary or *casual* stream, and that as such overflow was produced merely from the excess of water, which arose in wet seasons from the spongy swamp, or marsh, in which the proposed trench was to be dug, the case of the complainant had wholly failed.

A rehearing having been granted, however, with liberty to each party to file fresh affidavits, there is certainly now a considerable amount of testimony before us, not only respecting the permanency of the stream, which is described distinctly as running in a channel, but also respecting the length of time, specifically, during which the channel or stream of water has so flowed. There are expressions in some of the affidavits, nevertheless, relating to the flow and course of the water which have struck us, and especially when regarding the nature, admitted on all hands, of the ultimate, if not direct, source of its supply, as not being altogether free from ambiguity. If there were a constant stream flowing between *banks* (which is the idea suggested, and without which that of a continuous flow in a channel is incomplete), how comes it that, on the same side of the question, we hear of a flow over the *surface*; and that on the other side we find witnesses bold enough to deny that continual flow, or so blind as never to have seen those banks? And if it be said that, in so many words,

(3) 21 L. J. Ex., 241.

(4) 12 M. & W., 221.

1833. there is no such denial or assertion, we answer that it is scarcely
 COOPER possible to read the affidavits, in a view to this point, without scepticism
 CORPORATION as to the existence of any such banks. The fact that there are such
 OF SYDNEY. is now here alleged. Flowing water, over the surface of land, indicates
 Stephen C.J. a state of things opposed to the idea of a stream, and scarcely con-
 sistent with the supposition of permanency. But, by one of the
 witnesses the water is spoken of as being in reservoirs, supplied partly
 by surplus water from the swamp, and partly by soakage from water-
 sheds on the complainant's own ground. A constantly-running
 current in a bed or worn channel would have been too obvious to the
 eye to have admitted of either equivocation or dispute.

Supposing these points determined, however, other questions of no
 very easy solution will remain; and to these we accordingly now
 proceed. The flow of water, whether permanent or occasional is
 derived ultimately from a large marsh or swamp, never alienated by
 the Crown, called (from its having been dedicated, many years ago, to
 the supplying of Sydney with water), the Water Reserve. No stream
 or spring appears to exist there; but the spongy matter forming its
 bed, retains the waters which find their way thither by the fall of rain
 or by percolation underground. A portion of these waters, in the
 year 1832 or 1833, was conveyed by a tunnel into Sydney; and by that
 tunnel a large portion continues yearly to be abstracted. Other
 portions of the water from time to time overflow, and thence pass to
 lands, more or less distant, in the vicinity of Sydney. It is now pro-
 posed to abstract a further portion by a trench, which shall convey the
 water drawn there by the percolation or drainage which will naturally
 follow, into the city, for general consumption. This is the operation
 complained of, as an injury to the alleged stream below, which will
 thereby, it is said, be ruinously diminished in quantity, if not cut off
 altogether. But the respondents, denying the existence of that stream,
 insist on their right, as representing the Crown in this matter, to the
 unrestricted use of all the underground water, the same being a
 portion of the swamp occupied by them. For this they rely on *Acton*
v. Blundell (5). And they contend, secondly, that the work is, at all
 events, authorised as one necessary for procuring a sufficient supply
 of water for the use of the citizens, by provisions in the Tunnel Act,
 4 Will. IV, No. 1, s. 2, or in the Corporation Act, 14 Vic., No. 41, s. 72.

On the assumption that the stream on the complainant's land is
 temporary and casual only, occasioned by an overflow at times of the
 surplus waters of the swamp, we adhere to the opinion expressed by

us on the first hearing, that the enjoyment is not one which vests any right in him, as against the defendants. If, however, the stream be in a channel, between banks, *continually or habitually* so flowing, the case of *Dickinson v. the Grand Junction Canal Company* (6) is an authority to show that water which would naturally reach that stream cannot legally be abstracted, or prevented from so reaching it; whether such water be underground or not. We intend, therefore, to direct the trial of an issue, for the purpose of ascertaining the fact beyond dispute, as to the existence of such stream and channel. We shall direct also an inquiry touching the existence of a continual or habitual stream *not* between banks, in order that the question may be further considered, whether banks or a channel be or not essential to the character of a flowing stream, such as gives riparian or proprietary rights.

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There will, however, be yet another point in this case. If the stream or flow of water be *not* habitual, but be casual and accidental only, but it has in that state been enjoyed for twenty years or upwards, will the complainant or not have thereby acquired a right, which (according equally to both the cases cited) cannot now be prejudiced by the exercise of any other independent right? And this will open the very important question how cases of twenty years' enjoyment of easements are to be dealt with in this Colony. The statute for shortening the time of prescription, 2 and 3 Will. IV, c. 71, has not been adopted here. Can the Court, then, in such cases, as Judges used to do in England, before the passing of that enactment, direct the Jury to presume a grant? And, if we did so, could such a direction be safely acted on? In England, whatever may be said as to the practice, there would be comparatively little difficulty on either point. We should be met with this consideration here, however, on the threshold, that all lands have been, throughout the Colony, at a very recent date, in the hands of the Crown, and that there can be no grant from the Crown, except by record open to everybody. But, in addition to this, the Crown has never occupied or used the land, from whence the water claimed is derived, except only for the purpose of supplying the city with that element. Would not the presumption, therefore, of a Crown grant, conveying to an individual the surplus, or casual overflowing of the water from that land, be too violent to be adopted by any tribunal?

The other questions of law, connected with this portion of the case, may easily be disposed of. The Crown, or the Corporation of the

(6) 7 Exch. 282, and 16 Jur. 200.

1853. City, representing the Crown in this matter, irrespective of any powers conferred by the Legislature, can have no right, which an individual in such a case would not have. The respondents have not, it would seem, obtained any grant of the Water Reserve; but it is sworn, and is not as a fact disputed, that they are, and have been for many years, in possession of it, by the authority of the Crown, for the purpose to which (though not, it appears, by any formal act or instrument), the land has been dedicated. They are entitled to exercise, therefore, all the rights of the Crown in respect of that land. But, if the Crown has granted land to the complainant, or some one under whom he claims every advantage physically connected with it belongs to the grantee, or his assigns, for the Crown cannot derogate from its own grant. Whether the Crown granted, in addition, any casual or accidental advantage, such as that of the enjoyment of water, temporarily overflowing (or which might at times overflow) from underground sources on land remaining in its possession, is to be shown. Every proprietor, however, and, in general, every *occupier*, by reason of his occupation, is entitled, as an incident to the property in the land, to the reasonable use of the water of any perennial stream, (or, at least, of any such stream running in a defined course and channel), flowing through that land. And he is similarly entitled, and for the same reason, to have the stream continue so to flow, without any unreasonable use of its water, or of the water properly belonging to it, by any other proprietor or occupier. These positions are established, by the cases already cited, and by *Embrey v. Owen*, 6 Exch. 353, and 15 Jurist 637. The law, therefore, which affects the case generally, in common with others of its class, is sufficiently intelligible.

The second point, however, on which the respondents rest their defence, appears to us to be of considerable difficulty. The Act of 4 Will. IV, does not touch the question, for it relates exclusively to the *tunnel*, and works necessary for its construction or repair. But the 14 Vic., No. 41, ss. 71 and 72 are not so easily disposed of. By these, which are in the same terms as sections 87 and 88 of the former Act the City Council are authorised not merely to make aqueducts, reservoirs, cuts, tunnels, sluices, and waterworks, *in and through the City*, but they may "make and maintain other works," as they may think proper; and may dig, bore, and trench, for making or maintaining any such *waterworks*, and, "for effecting the purposes aforesaid," they may enter upon and pass over any river, stream, road, waste lands, or street, in the City or its vicinity; and construct, and do, all such matters and things as may be *deemed necessary*, for making or improving such waterworks, and *for bringing a sufficient supply of water*

for the city, provided that they shall make full satisfaction to the owners and occupiers of all lands *or other hereditaments*, taken, used, *or injured*, for all damage sustained by them by the execution of any of those powers.

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The enactment, therefore, is comprehensive, though strangely worded. Mention is made of satisfaction, for (among other things) *taking* lands, but no express power is given to take any lands. And no means whatever are pointed out for compelling payment of this satisfaction, or even of ascertaining or estimating its amount. The Council may enter on lands, if *waste*; but other lands are not mentioned, nor is it said what shall be deemed waste lands. So, they may enter on and over streams; but nothing is said respecting abstracting the water from them. And waters, not being *streams*, it would appear, are excluded. They may dig and trench, in order to *make and maintain* the waterworks, but not in order to supply them with water. The Council have power, nevertheless, in terms, to enter on streams and waste lands, in Sydney and *its vicinity* (which, we suppose, will include equally the complainant's land, and that of the swamp), and not only to do such things, as shall be necessary to make waterworks, *in* the city but as shall be necessary (or deemed necessary), for bringing a "sufficient supply of water" to it. If these words stood alone, there would be less room for doubt. It is not perfectly clear, however, that they are not limited and restrained, by the previous part of the section. That the words must have *some* limit, seems to be required by common sense. It would hardly be contended, for instance, that the Council could enter on any cultivated property whatever, in the vicinity of Sydney, and withdraw all the water from it, because the operation was deemed necessary, to supply water to the metropolis. And, if an unlimited construction be given to these words, what occasion was there for all which precedes?

As the case must again come before us, we throw out these suggestions as matter for future argument. But the principal question to which we would direct attention, is this, whether the proviso, at the end of the sections, is or not in the nature of a *condition*; and whether, therefore, if the complainant have the right which he asserts, the injury sought to be done to it by the respondents can be justified, until after that satisfaction shall have been made, for which the enactment so imperfectly provides.

In the meantime, for the solution of the matters of fact above referred to, and that the Court may be in a position to dispose of the

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whole case, on the coming in of the verdict upon them ; we direct the trial of the following questions in the form of an Issue, at the next ensuing sittings for causes.

1. Is there a running stream, in a channel between banks, flowing continually or habitually in such channel, from land of the Crown (or of parties other than the complainant), into and through the complainant's land.

2. If not flowing between banks, or in channel, yet is there in fact a continually or habitually flowing stream, from land as aforesaid, to and over the complainant's land ?

3. Is the complainant's land held, or claimed, under any grant thereof from the Crown ? and did the stream so flow at the date of such grant ?

4. If not a continually or habitually running stream, yet has there been an occasional flow or current on to the complainant's land from natural sources (under ground or otherwise) for a period of twenty years before the commencement of this suit, or upwards ?

5. Will the proposed works of the Corporation injure those of the complainant, or sensibly diminish the supply of water necessary for them ?

The *Solicitor-General*, for the respondents, suggested that these issues would not precisely meet the justice of the case, because it might be, that there was a stream at the tail of the swamp, which flowed on to the applicant's land, although at the place where it was proposed to cut the trench the surface of the swamp might be quite flat.

The COURT granted leave to send in proposals for amended issues, with a reservation, that counsel might be heard on this matter, if necessary.

Ex parte ROBERTS. (1)

1853.

Prohibition—Tenements Recovery Act—11 Vic., No. 2—Determination of weekly tenancy—Notice.

July 18.

Stephen C.J.
Dickinson J.
and
Therry J.

A statutory prohibition may not be granted in respect of proceedings under the Tenements Recovery Act, 11 Vic., No. 2 (2).

The jurisdiction of the Court at common law to grant a Prohibition against magistrates is limited to cases where their decision is demonstrably wrong.

In the absence of any official contract, or of any proof of a specific custom as to the giving of a week's notice, notice need not be given to a weekly tenant, to determine the tenancy.

MOTION for a Prohibition under the Tenements' Summary Recovery Act.

Stephen, moved to make the rule absolute.

Darcall, *contra*.

The CHIEF JUSTICE said a question had been raised as to whether the Court had jurisdiction in this case under the Prohibition Act, and the principle laid down in *ex parte Towns* (3) was, that such jurisdiction extended only to cases which were either of a criminal nature, or savoured of criminality in their character, but whether the Court had this statutory jurisdiction, or had merely the jurisdiction given by the common law, this was not a case in which they felt called upon to interpose. The material question in the case was, whether or not the tenancy was a weekly one, and, upon looking carefully through the affidavits, it was clear that there was evidence on both sides. Two of their Honors were of opinion that the preponderance of this evidence was in favour of the conclusion at which the magistrates had arrived; but at any rate it could not be said that the decision of the magistrates was demonstrably wrong, and it was only in that case that the powers of the Court at Common Law would warrant the granting of this application. Taking it as established that the tenancy was a weekly one, the only remaining question was, whether this had been properly terminated by an eleven days' notice, the term of which was not shown to end on the same day as the tenancy. In the argument of this branch of the case, it had been taken for granted on all hands

(1) *The Sydney Morning Herald*, July 15, 19, 1853. (2) Repealed by 17 Vic., No. 10. (3) *Ante*, p. 708.

1853. that the law required the giving of a week's notice to a weekly tenant ;
Ex parte but at the eleventh hour a case had been cited by one of their Honors
ROBERTS. (Mr. Justice *Dickinson*) which went to show that no such notice was
Stephen C.J. necessary. On considering this matter carefully, and looking through
the authorities, they could arrive at no other conclusion than that the
law was as it had been stated in that case, that, in the absence of any
special contract, or of any proof of specific custom as to the giving of
a week's notice, there notice need not be given to a weekly tenant.
The rule must therefore be discharged.

REGINA v. FORD. (1)

1853.

Breach of the peace—Challenge to a duel.

July 18.

Stephen C. J.
Dickinson J.
and
Therry J.

The conviction of a defendant under a charge of using certain expressions towards another, calling him a liar and a coward, &c., for the purpose of provoking him to commit a breach of the peace, by sending a challenge, is good, as the terms could only have been used with intent to provoke a breach of the peace.

MOTIONS in arrest of judgment and for a new trial, both being argued together by *Foster* and *Broadhurst*, for the defendant, and *Darvall*, for the prosecution. The charge was for using certain expressions towards the prosecutor, calling him a liar and a coward, &c., for the purpose of provoking him to commit a breach of the peace, by sending a challenge. The ground of both motions was, in effect, that the use and the object of this language must be regarded as being a mere expression of a contemptuous opinion, and not as an attempt to provoke a challenge.

Their HONORS held that such terms could have been used with no other object than to incite to a breach of the peace, such being their palpable tendency; consequently that there was a misdemeanour properly charged in the indictment, and fully established by the evidence.

The CHIEF JUSTICE, before whom the case was tried, then proceeded to pass sentence on the defendant. In so doing, His Honor dwelt upon the necessity of repressing all attempts of this nature to revive the now universally condemned practice of duelling; and commended the course taken by Mr. *Polhell* in appealing to the laws for redress, rather than countenancing, for an instant, the hostile views with which the insult had evidently been accompanied. This gentleman in fact, could not, His Honor remarked, have acted otherwise without infringing his sworn and solemn duty as a magistrate and a conservator of the public peace. But in all cases the Court must cast its shield around those who had the good sense to decline and punish all hostile invitations of this nature, and the only way of doing this effectually was to visit the offender with severe punishment. The offence, regarded seriously, was one of great magnitude. If the defendant had succeeded in obtaining his wish, he and another fellow-creature, both men with

(1) *The Sydney Morning Herald*, July 19, 1853.

1853. immortal souls, would have met with the express purpose of killing
each other, and one of them would, in all probability, have been hurried
before his Maker in the very act of attempting to commit a murder, or,
at all events, of grossly breaking the laws of both God and man.
So far as the Court could perceive, the insult given by the defendant
appeared to have been wholly unprovoked, and the youth of the defendant
was the only mistaking (?) circumstance of which cognizance
could be taken. The sentence of the Court was that the defendant
should pay a fine of £50 to the Queen and should be imprisoned until
that fine be paid.

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Stephen C.J.

FISHER v. KEMP AND ANOTHER. (1)

1853.

New trial—Three classes of cases in which new trials are granted—Weight of evidence—Witness.

July 21.

Stephen C.J.
Dickinson J.
and
Therry J.

There are three classes of cases in which a new trial will or may be granted.

- I. Where the verdict is *demonstrably* wrong, in which case the new trial is a matter of right, and to be granted without payment of costs.
- II. Where, though not demonstrably wrong, the verdict appears to the Court, upon the whole to be against the *weight* of evidence. New trials in such cases will be granted or refused, according to their circumstances, and either with or without costs.
- III. Cases, not within the previous classes, but in which, from other circumstances, the ends of Justice require a further investigation.

In this class of cases the Court will not grant a new trial, even upon payment of costs, unless it appear *probable* that it will be productive of a different result.

A witness in his own case is entitled to no peculiar privilege, or claim to be regarded in any other light than an ordinary witness in the cause.

New trial motion. The case, which was tried before the *Chief Justice*, and a special Jury of twelve, was an action for a libel published in the *Sydney Morning Herald*. The plaintiff was a city councillor and a Justice of the Peace, and the alleged libel was a statement in the *Herald* that the plaintiff, while acting publicly in his capacity as city councillor, "appeared to be labouring under the effects of drink." The declaration alleged the inuendo to be that plaintiff was drunk, and the defendants adopted and justified this inuendo in their plea, alleging that the plaintiff *was* drunk, and that the statement of this fact in the newspaper had been made for the public benefit. A verdict by majority, ten to two, was taken by consent, before the expiration of six hours, and was for the defendants.

The plaintiff now moved for a new trial upon three grounds:—

1. That the verdict was against evidence.
2. That it was against the *weight* of evidence.
3. That the jury overlooked or misapprehended the true issue which they had to decide, whether or not the plaintiff was *actually drunk*, one of them having openly stated that the jury would probably not regard the pleadings at all.

(1) *The Sydney Morning Herald*, July 22, 23, 1853, and *Sup. Court Practice* (ed. 1856) 150. Cited 10 S. C. R. 16; 13 S. C. R. 372; 7 S. C. R. 397; 8 N.S.W. L. R. 195, 257.

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The CHIEF JUSTICE, at the request of counsel, read the whole of his notes of the evidence (2), and stated that, as regards the juryman referred to, he had warned him that to take such a course would be a breach of the jury's sworn duty.

The *Solicitor-General* and *Broadhurst*, in support of the motion.

Darvall and *Fisher*, *contra*.

The CHIEF JUSTICE had, he said, been most anxious, if he could, to have arrived at the conclusion that a new trial might be granted; but having heard and maturely weighed the arguments on both sides, he was constrained to hold that there could be *no* new trial. And first he would say that a new trial was not, in fact necessary, to afford the plaintiff an opportunity of relieving himself from an imputation of perjury; for the verdict did not, of itself, convey any such imputation, and the defendant's counsel had expressly disclaimed the slightest desire to do so. It was perfectly possible, and by no means improbable, that the jury had decided upon the question at issue without doubting the intention of the plaintiff to speak with perfect truthfulness, as to his condition at the time in question. They might, while feeling convinced from the evidence of others that the plaintiff was actually intoxicated, have been equally convinced that the plaintiff himself did not think so. But even if an imputation of perjury *had* been cast upon Mr. *Fisher* as the necessary consequences of this verdict, he (the *Chief Justice*) should hesitate to grant a new trial upon this ground. If the fact, that a verdict conveyed an imputation of perjury against any particular witness or witnesses, would warrant the granting of a new trial, the inevitable conclusion must be, that in every case where there was strongly conflicting testimony there must necessarily be a new trial; for in all such cases the verdict necessarily raised an imputation of perjury, more or less strong according to the circumstances, against the witnesses who had given evidence for the losing party. And there would be no possible finality, for each new verdict would convey such an imputation against one side or the other, and afford an argument for a further appeal to the Court. It was true, that Mr. *Fisher* was not only a witness but a party to the suit. For the purposes of this question, however, it was only in his capacity as a witness that he could be regarded. Where any plaintiff or defendant, either from choice or necessity, became a witness for himself, the Court could not recognise the slightest difference between his position and that of any other witness. The character of the plaintiff was

(2) The trial was reported fully in the *Sydney Morning Herald* of June 6.

impeached by the verdict, no doubt to this extent, that he was (not generally, but on one particular occasion) intoxicated. But this alone would not be a ground for a new trial. It would be entitled to weight, if coupled with other ingredients, sufficient on the whole to warrant a re-opening of the investigation. If the value of any particular property was a reason, with others of sufficient weight to justify the granting of a new trial, equal weight must be given to questions of character. But in this case, the other necessary ingredients were wanting. There were three classes of cases in which a new trial would or might be granted. The first of these was of cases where the verdict was *demonstrably* wrong, *i.e.* where it could be clearly shown that the Jury had arrived at a wrong conclusion. In these cases, the losing party would have a new trial as a matter of right, without payment of costs. The second class of cases was of those, in which the verdict was not demonstrably wrong, but in which the Court thought, upon the whole, that it was against the *weight* of evidence. New trials would be granted or refused, in such cases according to their circumstances, and, if granted, it might according to the nature of the case, be either with or without costs. The third class included those, in which the verdict could neither be described as demonstrably wrong, nor as against the weight of evidence; but in which, from some other circumstances, the ends of justice required that there should be further investigation. The governing principle in this class of cases was this:—The Court would not, in any such case, grant a new trial, even upon payment of costs, unless it appeared *probable* that the new trial would be productive of a different result. But not even *then* would the Court grant a new trial, unless there were some attendant circumstances which rendered it for the ends of justice desirable, such as, either the effect of the verdict upon the character of the parties, or the great value of the property involved in the issue, or its affecting important right of others, coupled with other matters, such as the complexity of the question, or of the evidence, that the Jury were not unanimous, that further evidence could be adduced, that the losing party were taken by surprise or the like. No one of these ingredients would, if standing alone, be sufficient. The present case came within the third class, and there were no grounds on which the Court would be justified in saying, that it was probable there would be a different result if the case was sent before another Jury. He had already stated that his own opinion, at the time of the trial, was that the verdict ought to have been the other way, and he still retained that opinion. He had formed it by carefully weighing, collating, and contrasting the evidence, and by observing carefully the demeanour of the witnesses, and

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1853. his experience enabled him to do this, as well as any one of the Jury. But he claimed no more weight or authority for his opinion, on matters of fact, than would be due to the opinion (*cæteris paribus*) of any one jurymen. And it by no means followed, that, because a Judge thought a different verdict would have been warranted, there was a probability of twelve jurymen being of the same opinion. It was true, that the verdict in this case had been by a majority only, and this undoubtedly, was one of the circumstances upon which a new trial might be granted. But it was not a ground for a new trial *of itself*. If it were once regarded in this light, the objects of the law, which rendered a verdict by three-fourths of the jury equal, under certain circumstances, to a verdict by the whole, would be defeated. And the verdict here, having been arrived at by ten out of twelve jurymen, what right had the Court to suppose that there would probably be a different conclusion, if the case was sent to a second jury? If a new trial was granted, the case would go down upon the mere *chance* of a different verdict. For, though there was a preponderance of probability (in his individual opinion) in the plaintiff's favour, yet the evidence was very strong on both sides, and painfully conflicting; and no person could venture to form a judgment, that as many men might not incline to one side as to the other, in such a state of things. But, if there should be a verdict for the plaintiff, it was admitted that he could not reasonably expect more than nominal damages. It was conceded, that the conduct and language of the plaintiff had been such, as naturally to lead others into a belief that he was intoxicated. It was conceded, also, that the statement declared upon as libellous had been published *bonâ fide*, and without any malicious intent. These things being conceded, what was the great point to be gained by a new trial? And was Mr. *Fisher* the only person to be considered? He did not, indeed, attach much weight to the argument, that the defendants might be open to the accusation of being malicious defamers; for, in the face of the admissions alluded to, such an imputation would be absurd. But although *their* character would not be staked on the issue, yet the defendants having justified their charge, and having appealed to the decision of the country as to its truth, and the country having pronounced a decision in their favour, would the Court be justified in compelling them to undergo a second ordeal on the mere chance of a verdict for the plaintiff, with nominal damages? As to the principle upon which, as it was suggested, the jury must have acted, he could not see that the Court would be warranted in supposing, that they had regarded rather the question raised by the libel itself, in their own possible construction of it, rather than the question

raised by the pleadings. One of the jury only had intimated such an intention, but there was no reason to assume that he spoke for the rest. And this gentleman was told distinctly from the Bench, that it was his sworn duty to decide only the issue raised by the pleadings. The jury, therefore, must be supposed to have performed that duty. The learned Chief Justice then proceeded to go into detail through the cases, whereby the principles which he had laid down were supported. The principle that a new trial could only be granted, *as a matter of right*, in cases where the verdict of the Jury was demonstrably wrong, and not in cases where the Court might think that the balance of testimony pointed to a different conclusion, was distinctly and clearly laid down in the case of *Belcher v. Prittie* (3). The cases quoted by His Honor, in which the Court had granted new trials *ex gratia*, upon payment of costs, were the following, *Hingarty v. Sinclair*, October, 1847; *Beckham v. Potter*, April, 1848; *Dawson v. Hanson*, April, 1848; *Windeyer v. Ogilvie*, April, 1848; *Irving v. Sly*, July, 1848; *Mallady v. Bradley*, December, 1849; *Doe v. Cross*, April, 1850; *Marsh v. Burnett*, April, 1850; *Cope v. Kinghorne*, October, 1851; *Wilmington v. Murnin*, July, 1852; and *Richard v. Davis*, December, 1852. His Honor showed, that in *each* of these cases two or more of the ingredients already defined had been united; and that there had been also, in every case, a reasonable ground for supposing that a new trial would probably be productive of a different verdict.

DICKINSON, J., was of the same opinion, and had but little to add to what had already been said by the *Chief Justice*. They were first called upon to say whether the plaintiff was entitled to a new trial as a matter of right. And here the case of *Belcher v. Prittie* in 10 Bingham was one precisely in point. The principle there laid down was, that there could not be a new trial, simply because there was some degree of doubt in the minds of the Judges, whether the Jury had come to a right conclusion. The Court must be *satisfied* that the Jury was wrong. Now it was impossible for him to say, in this case, that he was satisfied the Jury were wrong. There were about twenty-two witnesses, who testified to their belief that the plaintiff was sober, and there were about eleven, who said that he was drunk or something like it. But, although, in a numerical point of view, the evidence of Mr. Fisher's sobriety seemed twice as great as the evidence of his drunkenness, still, as he had not, like the Jury, had an opportunity of seeing the demeanour of the witnesses, and judging as to the degree of credit to be attached, he could not take upon himself to say that

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the Jury were wrong, in believing the eleven rather than the twenty-two. It was clear, consequently, that there could be no new trial here as a matter of right. But it next became necessary to consider, whether or not a new trial could be granted on terms, as a matter of grace or indulgence. And this was asked for upon the conjoint effect of three grounds. 1. That, if there was not an actual and conclusive preponderance of testimony in favour of the plaintiff, there was at all events a strong numerical superiority as to witnesses on his behalf. 2. That two of the Jurymen had been of opinion that plaintiff ought to have recovered, and there was ground for assuming that the other ten had arrived at their verdict rather by considering the truth or falsehood of the newspaper report, than by considering the actual issue. 3. That the verdict cast an imputation upon the plaintiff, from which he ought to have an opportunity of clearing himself by appeal to another Jury. It could not be intended, by the Judges, who knew nothing of these Jurymen, that they entered upon the consideration of their verdict with a determination to break their oaths. The Judges were bound to intend the very reverse of this, that the Jurymen, who said that the issue raised by the pleadings would be disregarded by the Jury as a body, had made a mistake, and that even this gentleman, after having been set right by the *Chief Justice* as to the nature of his duty, had devoted his judgment to the consideration of the actual issue which he had been sworn to decide. The fact of a verdict having been by majority only, had never been held as an ingredient for sending down a case for a second trial, unless coupled with obvious confusion and intricacy in the evidence, whereon the Jury had to determine, even with some other of the additional reasons alluded to. But the evidence in this case was particularly distinct, and it was a mere question with the Jury as to which side they would give credence to. If he had been a Juror, and could have seen that the demeanor of the witnesses respectively, on either side, was equally worthy of favourable consideration, then as he thought the statements on one side were capable of reconcilable with the statements on the other, he should, as soon as the Chief Justice had finished summing up, have found a verdict for the plaintiff. His own distinct impression from the evidence, as he had formed it from His Honor's notes, was that it pointed at this conclusion, that at the time of this exhibition the plaintiff was in fact sober; but exhibited such appearances, as naturally induced many of those who saw him not only to believe at that time that he was drunk, but to retain that belief afterwards. But this was a question, which the Jury alone, who heard the evidence, were competent to decide.

The imputations which this verdict might be supposed to have cast upon the plaintiff's honour might be fairly said to have been removed, by the opinions which had been expressed by the Court and by the defendants' counsel. He (Mr. Justice *Dickinson*) was also inclined to think that, if the case was sent down again, there *might* be a different result. But even should this be the case, it would still remain an unquestionable fact, that the plaintiff had acted so extravagantly, as naturally to induce a belief that he was intoxicated, among those who observed him; and he might thus be considered as having contributed to his own wrong. Therefore it was to be apprehended that he would recover only nominal damages, a result by no means demanding a new trial for its accomplishment. Moreover, if the general issue had been pleaded, the same evidence which pointed at the conclusion that the plaintiff *actually* sober, would, at the same time, by showing that the reporter believed what he said about the plaintiff being drunk, have been evidence that the defendants had not *maliciously* published the libel; in which case the latter would have been entitled to the verdict under that issue, and that view justified his opinion that, upon a second trial, nominal damages only would be awarded.

Therry, J., concurred with his learned colleagues, and would only add but little. It did not appear to him that there was any imputation of perjury against the plaintiff. The whole of his conduct, his earnestness in pressing this action, showed that he was acting under the honest impression that he was perfecting free from intoxication. Further, the assurances of his friends must have suffered to sustain and strengthen him in this belief. He (Mr. Justice *Therry*) deemed it more prudent to abstain from saying what conclusion he should have arrived at if he had been on the Jury. So much more depended upon the character and deportment of witnesses, that upon the mere numbers on one side or on the other, that he was unwilling to say he should have arrived at a conclusion different from that at which the jury had arrived, without having the opportunity, which they had and he had not, of witnessing the manner and regarding the character of the witnesses. His long experience of Courts of Justice had taught him to regard the quality of the testimony fully as much as its quantity, and when impressed with the superior moral force and weight of the minority, he would not hesitate to act upon it in preference to a mere numerical majority of witnesses. But it seemed to him probable, nevertheless, that the plaintiff might, on the occasion referred to, have been sober, although he might at the same time have exhibited the appearance of intoxication so strongly as to have caused many who then saw him to have felt morally certain that intoxication was the cause of his excitement.

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There were many persons whose manner of speaking and acting, when excited, so closely resembled the kind of speaking and acting induced by drunkenness, that it was often very difficult indeed to distinguish between the one and the other. One such person he had been in the habit of seeing repeatedly when he was Commissioner of the Court of Requests. This person became so excited when before the Court that he exhibited all the appearances of a drunken man, and it was not until after the lapse of a considerable time and much observation and experience of his excitable temperament that he could believe this to proceed from excitement alone, and yet it unquestionably was so, and his belief now was that the man had, on every occasion, been sober. The excitement arose in the instance he alluded to from doggedness and obstinacy of the man's character, and his susceptibility to irritation when opposed or contradicted, so that it led him into eccentric conduct, and extravagant expressions, similar to the conduct, and language of an intoxicated person. It was thus often a very difficult point frequently to determine, but of this the Jury were the appropriate judges, and having found on conflicting testimony a verdict, he could not undertake upon himself the responsibility of saying that they had arrived at an erroneous conclusion.

On another point which had arisen now for the first time, he wished to express his decided concurrence in the principle that where any party became a witness in his own behalf, it was in his character of witness only that he could be regarded by the Court. A witness in his own case was entitled to no peculiar privilege, or claim to be regarded in any other light than any other witness in the cause. He (plaintiff) would have no more right to a new trial because his own testimony was impeached by the verdict, than the defendant, if the verdict had been the other way, would have had a right to a new trial because that verdict would have impeached the credit of *Mr. Egan* and his other witnesses. Character was no doubt involved on both sides, for if on the one hand there was an imputation against the plaintiff of intoxication, there was on the other an imputation against the defendants of being defamers; and, in his own opinion, each was entitled to have equal weight. It was said that no malice was imputed to the defendants, but the public was not very attentive to those distinctions of malice, and nominal damages with which Courts were familiar. If there had been a verdict for the plaintiff, the public would say *Mr. Kemp* had been convicted of a libel, and that is all they would say or think about it. As the case then stood, the plaintiff, in the opinion of all who took part in the present discussion, was cleared of any imputation of perjury, but as he (*Mr. Justice Therry*) was not satisfied

that any new trial would probably lead to a different result than that arrived at, at the former trial, he did not think that the Court ought to grant a new trial, in the exercise of its discretion, in a case which lasted two days, which had been thoroughly investigated, and which would only be attended with renewed and augmented excitement and expense, without the prospect of a corresponding benefit to either party or to the administration of public Justice.

1853.

FISHER

v.

KEMP.

Therry J.

New trial refused.

1853

Ex parte McCULLOCH v. SPAIN. (1)

Aug. 4.

Dickinson J.
and
Therry J.*Criminal information—Libel—Prosecutor contributory to his own wrong.*

Prosecutor, an attorney, in consequence of the receipt of an insulting letter from another attorney, the defendant in the matter of an action, in which they represented the respective parties, communicated directly with the latter's client. The defendant then wrote and sent to the former a letter containing libellous matter.

Held, that the former must have known that his action would produce angry feelings, although not wrong in itself, and he was therefore not entitled to an exercise of the extraordinary power of the Court by way of criminal information.

THIS was a rule *nisi* granted at the instance of Mr. *Andrew H. McCulloch*, an attorney of the Court, calling upon Mr. *William Spain*, also an attorney of the Court, to show cause why a criminal information should not be filed against him for having written and published a letter, libellous and defamatory in its character, addressed to Mr. *McCulloch*, and calculated to provoke the latter to commit a breach of the peace.

The *Solicitor-General* and Mr. *Broadhurst* appeared to support the rule, and Mr. *Darvall* appeared to show cause against it.

The following is a statement of the facts as they appeared upon the affidavits in support of the rule.

Mr. *McCulloch* being the plaintiff's attorney in an action by Mr. *Birnstingl* against Mr. *McKean* for the loss of a parcel containing four watches imported by the *Cleopatra*, wrote the following letter to Messrs. *Rogers* and *Spain*, the attorneys for the defendant, on the day of its date :—

Elizabeth-street, Sydney, June 18th, 1853.

Birnstingl v. McKean.

Gentlemen,

I find it will be necessary on the part of the plaintiff to obtain evidence from London of the description and cost of the goods for the non-delivery of which this action was brought. I have in my possession the original invoice of the goods received from the plaintiff's London agents showing those facts, and will be happy to allow you to inspect it, and, as I presume there is no desire on the part of the defendant, either that useless expense should be incurred, or that the suit shall be kept over his head for probably twelve months more, and as the description and cost of the goods are, I believe, no part of the merits of the defence, perhaps you will admit those facts in order to avoid the expense and delay of a commission.

(1) *The Sydney Morning Herald*, August 5, 1853.

If so I can proceed to trial at once and have the real question disposed of. Otherwise I shall be obliged to apply for a commission to examine a witness in London, and shall seek to make the defendant pay the costs occasioned thereby.

1853.

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SPAIN.

I am, gentlemen, your obedient servant,

Messrs. Rogers and Spain.

A. H. McCULLOCH.

This letter drew the following reply—written by a clerk in the office of Messrs. *Rogers and Spain*, but signed by Mr. *Spain* in the name, as will be seen, of the firm:—

George-street, June 20th, 1853.

McKean *ats.* Birnstingl.

Sir,

In answer to your letter of the 18th instant, we regret being obliged to decline yielding to the concession against the defendant, sought to be extorted as it is by your puerile and unprofessional threat.

We are, Sir, your most obedient servants,

A. H. McCulloch, Esq.

ROGERS AND SPAIN.

At a previous stage of the case some interlocutory costs had been awarded by the Judges against the defendant. On the 21st July an appointment was made to tax these costs, and on the 23rd they were taxed at £10 8s. 4d.; defendant's attorneys not attending. At this time Mr. *McCulloch* had heard that defendant was about to leave the Colony, and was instructed by the plaintiff to compel the putting in of bail. To prevent, as he stated, the necessity of the latter proceeding, and save the defendant the annoyance of a personal demand, as required by a rule of Court, Mr. *McCulloch* wrote the following letter to the defendant, being prevented from communicating by letter with the defendant's attorneys by the insulting tone of the letter of the 20th June.

No. 219 Elizabeth-street, Sydney, July 26th, 1853.
Birnstingl v. Yourself.

Sir,

I deem it right to inform you, in case you should not be altogether aware of it, so as to give you plenty of time to make arrangements accordingly, that it will be necessary for you to put in bail or given security in this action before you leave the Colony again. I further beg to acquaint you that the costs directed to be paid by you to me, on dismissal of the application made to the Court on your behalf on the 30th April last, have been taxed by the proper officer at £10 8s. 4d., and you are requested to pay the same, to avoid the necessity of troubling you in a formal demand, and subjecting you to the cost of further proceedings.

I am, Sir, your obedient servant,

A. H. McCULLOCH,

John McKean, Esq.

Plaintiff's Attorney.

On the following day came the letter which formed the subject-matter of the present application. It was in these terms:—

Sydney, July 27, 1853.

Birnstingl v. McKean.

Sir,

Our client has placed in our hands a letter addressed by you to him, intimating your intention of applying for security in this action, at the same

1853.

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v.
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time demanding payment of £10 8s. 4d. taxed costs, upon dismissal of application made to the Court on his behalf, without any previous reference to us on the subject.

Previous experience had so completely convinced us that, from your ignorance of the habits and manners of gentlemen, you were incapable of conducting your professional business as gentlemen invariably do, that we were not surprised at your continuing a contrary practice; but we hardly supposed that you would have had the temerity and audacity to have addressed such a letter to our client instead of ourselves.

We are anxious to give you an opportunity of explaining your conduct; but unless you do so to our complete satisfaction, and apologise to us for such disreputable and unprofessional practice, we will call a meeting of the Law Society, and expose your proceeding to every member of the profession.

We are, Sir,

Yours, obediently,

ROGERS AND SPAIN.

A. H. McCulloch, Esq.

This letter, like that of the 20th June, was said to be in the handwriting of a clerk, although signed by Mr. *Spain*, and the consequent handing of the original draft of this letter to the clerk who copied it was relied upon as being such a publication as would satisfy the requirements of the law in this respect and make the letter a libel, if its character was really libellous.

The general effect of the affidavits in reply was to justify this letter as a rebuke administered to Mr. *McCulloch*, in a *bonâ-fide* belief that he had not only acted unprofessionally, but with a desire to injure Messrs. *Rogers* and *Spain* with their client.

After argument, and an ineffectual attempt made by their Honors to effect an arrangement,

The Court held that the rule must be discharged, but without costs, and for this reason, that they regarded this conduct of Mr. *Spain* as highly blamable, while on the part of Mr. *McCulloch* nothing whatever had been done to merit the treatment which he had received at the hands of the former gentleman. The conduct of Mr. *McCulloch* had, in fact, throughout the whole proceeding been quite consistent with the course and demeanour of a gentleman, and the imputations of extortion and puerility in the first letter were wholly uncalled for and unwarranted. They were sorry that any gentleman should have addressed such terms to another, and they were more especially sorry that terms like these should be causelessly used by a gentleman so highly respectable as Mr. *Spain*. They could only account for the use of them upon the assumption that Mr. *Spain* had taken a hot-headed intemperate view of the matter before him, and that it was under the influence of a violent passion created by this view that he had written so offensively. After the receipt of the first letter Mr. *McCulloch* was

fully justified in holding no further personal intercourse with Mr. *Spain*, and as matters thus stood there was nothing in the slightest degree wrong, either morally or socially, in his writing to Mr. *Spain's* client, instead of to Mr. *Spain* himself, as to a demand which he was unquestionably entitled to make. But in thus standing upon his justly offended feelings, and departing from the course required in ordinary circumstances by professional etiquette, Mr. *M'Culloch* must have been aware that he was doing what would be likely to arouse angry feelings on the part of Mr. *Spain*. It was a known principle of law, applicable to actions on the case, that a man should not be entitled to damages who had been contributory to his own wrong. By analogy, in the present case, Mr. *M'Culloch* having thus taken a course which, however justifiable under the circumstances, was one which he must have known to be likely to produce angry feelings, had forfeited his right to have this extraordinary power of the Court exercised in his behalf, and must be remitted to his ordinary remedy by indictment or civil action.

1853.

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The Court.

Rule discharged, without costs.

1853.

Ex parte M'KINNON. (1)

Oct. 10.

Stephen C.J.
Dickinson J.
and
Therry J.

Scab Act, 10 Vic., No. 8, sec. 2—Liability of master for servant's acts.

For a conviction, under the Scab Act, 10 Vic., No. 8, s. 2, of the owner of a flock, for having "permitted or suffered" a trespass on another person's station of diseased sheep, in charge of a shepherd, clear proof must be given of the owner's participation in the offence. The acts of the shepherd, although civilly binding the master, cannot render him liable in a proceeding of this nature, unless by express terms in the Act.

MOTION for a Prohibition to restrain Messrs. *Heathorne, Syers, and Wyse*, magistrates of Bathurst, from carrying out a conviction of Mr. *M'Kinnon* and Mr. *Duncan*, upon whom they had imposed a fine of £5, under sec. 2 of the Scab in Sheep Act, 10 Vic., No. 8.

Certain diseased sheep belonging to *M'Kinnon* had been found in charge of a shepherd upon the station of another person, but there was no evidence as to whether or not the shepherd had brought them there with the cognizance of his master.

Stephen, for the applicants, contended that the clause in the statute, being penal, must be construed strictly, and there was no proof of *M'Kinnon's* having "permitted or suffered" this trespass.

Holroyd, contra.

Their HONORS made the rule absolute, but without costs. There was no proof that these applicants had "permitted or suffered" this trespass by their shepherd, and as the statute was at present worded, proof of that nature was indispensable. The acts of the shepherd, although binding the master, as far as a civil responsibility went, could not render him liable for a proceeding of this nature, unless such liability had been expressly imposed by the Legislature. From the general wording of the clause it must be assumed in construction that this "permission or suffering" there alluded to must be clearly wilful and not merely constructive; consequently, there must be some evidence of this participation in the offence to warrant a conviction.

Prohibition granted, without costs.

REGINA v. LIFFIDGE. (1)

1853.

Larceny—Bailee—Drover—Misfeasance of servant—Possession.

Oct. 24.

Stephen C.J.
Dickinson J.
and
Therry J.

One who hires a drover to take cattle from one place to another is not answerable for any misfeasance by that drover, inasmuch as the latter has an independent calling, and is not in law the servant of his casual employer. A conviction, therefore, of such a drover of *larceny* in stealing two bullocks which he had sold on the road, is bad, for he had *possession*, not *charge* merely.

SPECIAL CASE. *Purefoy*, for the prisoner; *Callaghan*, in support of the conviction. The facts appear in the reserved judgment of the Court, delivered, Oct. 24, by—

The CHIEF JUSTICE. This is a special case, stated by the Chairman of the Court of Quarter Sessions, for the opinion of the Judges of this Court. The prisoner has been convicted of *larceny*, in stealing two bullocks, and the question is whether the conviction can, in point of law, be supported.

The prisoner was employed by the prosecutor to drive a herd of cattle a distance of about three days' journey, for which he was to be paid, on delivery at the place specified, so much per head, *according* (so the case states) *to the usual rate and custom for driving cattle*. In addition, the prisoner was paid his expenses for the first day, and was to get all necessary supplies on the road, at the cost of the prosecutor, for the second and third days. The prisoner had no authority, under any circumstances, to sell any of the cattle. He sold two of them, however, on the road, and appropriated the proceeds to his own use. This was the act relied on, against the prisoner, as constituting the supposed *larceny*.

There was no agreement or memorandum in writing between the prisoner and his employer, under the Drovers and Carriers Act, of 14 Vic., No. 6. The case, therefore, is unaffected by that very useful enactment, and two questions arise in it. First, was the prisoner employed as a drover, that is to say, as a person (ordinarily or occasionally) carrying on that business. Secondly, if so, was he in the position of a *servant* merely, or of a *bailee*, as a carrier is. If a servant, the prisoner had (in legal contemplation) no possession of the cattle,

(1) *The Sydney Morning Herald*, Oct. 15, 26, 1853.

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Stephen C.J.

but a bare *charge* only, and so, the conviction will be sustained. If a bailee, he had *possession*, and could not, therefore, be guilty of larceny, unless, indeed, he intended from the first to steal them, which the case negatives, by any subsequent appropriation of the animals.

The case of *M'Namee* was relied on for the Crown (2), followed by that of *Hughes*, in p. 370, and *Jackson's case* (3), to show that this prisoner was a servant merely. But, if so, the prosecutor was responsible for his acts, that is to say, all acts done by the prisoner, in the natural course of his employment. The cases of *Quarman v. Burnett*, however (4), and *Milligan v. Wedge* (5), have decided that an employer is not so responsible for the act of any person hired by him, not being in common acceptance his servant, who carries on or holds a distinct business or position. Thus, he who engages the owner or driver of a carriage for a journey, or hires horses and a coachman from a job-master, to drive habitually the employer's own carriage, is not answerable for any misfeasance by such driver or coachman. And on the same principle (as distinctly laid down in the case last cited) he who hires a *drover*, a person having the occupation, or following the business, of a drover of cattle, to take property of that description from one place to another, is not answerable for any misfeasance by that drover. In other words, such a person, being in the position of one who has an independent calling, is not in law the servant of his casual employer.

On the authority of those two cases that of *Hey* was decided (6). The prisoner there was employed, being a butcher and drover, to take pigs to a person at Leeds, and bring back their price, which had been previously agreed upon, between that person and the prosecutor. The prisoner had no other instructions, and no authority whatever to sell, but, having taken the pigs to their destination, and not getting a ready answer there, he sold them, and absconded with the money. By the usage among drovers, he might have driven cattle on the same journey, had he thought fit, for other persons. The prisoner received money from the prosecutor for his expenses, but nothing was said as to the amount or mode of his remuneration. The custom was to pay a certain sum per day. It was held by Barons *Parke* and *Anderson*, and Judges *Coleridge* and *Coltman* (with the concurrence of Chief Baron *Pollock*, after taking some months to consider, Lord *Denman* dissenting), that the prisoner was a *bailee* of the property, and could not, therefore, be properly convicted of larceny in appropriating it.

(2) 1 Moo. C.C. 368.

(3) 2 Moo. C.C. 32.

(4) 6 M. & W. 510.

(5) 10 L. J., Q.B. 21.

(6) 1 Den. C. C. 602, and 2 C. & Kir. 987.

The following passages, from the judgment delivered by Mr. Baron *Parke*, will show clearly the principle of the decision:—"There are several reported cases bearing on the question, whether a person is a mere servant or a bailee. There are none precisely like the present, though the case of *Rex v. M'Namee* nearly approaches it. In this case, on the one hand, the circumstance that the prisoner was paid the expenses of the cattle, and also that the customary mode of remuneration was by the day, tend to show that he was a mere servant. On the other, the fact of his being a drover by trade, and also of his having liberty to drive the cattle of any other person, by the general usage with respect to drovers, raises an inference that he was not a servant." And after some remarks on *Hughes' case*, already noticed, the learned Judge proceeds to state the question thus. "It is, whether the prisoner had the custody of the cattle, as a servant to the prosecutor, at the time of the receipt of them. And we think that he could not be so considered, unless in driving the cattle to market he *was such servant*, and the prosecutor responsible for any negligent act of his in driving them. This subject has undergone much discussion of late, and has been placed on its proper footing by the case of *Quarman v. Burnett*, and other cases, one of which is that of a general drover, who was held not to be a servant, so as to make the owner of the cattle responsible for his negligence."

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His Lordship adds the expression of a doubt, whether, after the full consideration which the subject had undergone, the case of *M'Namee* would now be decided the same way. It appears to us, that by the judgment in *Hey's case*, following the decisions in 6 M. & W. 510, and 10 Law Jour. Q. B. 21, that of *M'Namee* must be considered as overruled. But, whether this be so or not, *Hey's case* is an authority, in our opinion, for holding that there was a bailment, and not a charge merely, in the case before us. Although there was no evidence, that the prisoner might have driven the cattle of other persons, had he so pleased, and although he was paid (or to be paid) his expenses on the road, as a servant naturally would be, yet his remuneration was to be at so much per head, of the prosecutor's cattle, and his business seems clearly to have been, from the terms of the contract, that of a drover, although, perhaps, it may not have been in his case strictly a trade, and he may have had other ordinary or occasional occupations. To hold that a person of that description, engaged on such a service, becomes thereby the employer's servant, subjecting the owner of the cattle to all the consequences of such a relation, we think would be as little consistent with reason, as with law.

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This judgment being founded on the authorities cited by us, and those authorities very clearly marking the distinctions, in reference to which cases of this class must be decided, it is unnecessary to do more than notice slightly those of less recent date. In *Goodbody's case* (7), the prisoner was a general drover, and the decision was, that he was a bailee. In *Harvey's case* (8), on the contrary, the prisoner was a person casually employed specifically to take the cattle to a certain place, for a specified sum, and there show them, and then bring them back. That was a tolerably clear case, therefore, of entrusted charge only, as to a servant. The case of *Jackson*, in 2 Moody's C.C. 32, was similar. The prisoner was no drover, but hired to take cattle to a place named, for a stated sum. *Hughes' case*, if still law, was not a case of larceny, but of embezzling money under the statute. Now the prisoner, as a drover, would naturally have had nothing to do with money, the proceeds of cattle driven by him, unless he had been himself the party selling; which he was not. He may, therefore, possibly have been rightly deemed a servant, within the meaning of that statute, in respect of the money, and yet have been a bailee of the cattle, for which that money was paid him. The case of *Stock* (9) is clearly distinguishable, as there the question was, not whether the circumstances constituted a bailment, but whether the prisoner did or did not intend to steal, at the time when he received the property.

The result is, upon the whole, that in our opinion the prisoner *Liffidge's* conviction is wrong; and he will, therefore, be discharged from custody.

Conviction quashed.

(7) 8 C. & P. 665. (8) 9 C. & P. 353. (9) 1 Moo. C.C. 87.

REGINA v. RYAN. (1)

1853.

Attempted rape—Drunkenness—Intention.

Nov. 16.

Stephen C.J.
Dickinson J.
and
Therry J.

The prisoner was found guilty of an assault with intent to commit a rape. At the time of committing the offence he was intoxicated.

Held, (per the Chief Justice and Therry, J.) in cases, such as this, where the crime is statutory, and intention is essential to the charge, the jury should be instructed that they must find the specific intent charged, and that, in considering the evidence as to that intent, they should find only (if the prisoner was intoxicated) whether he was so much intoxicated as not to have been able to form any specific intent.

Dickinson, J., dissented from this restriction as to the finding.

SPECIAL case from the Bathurst Assizes. The judgment of the Court was pronounced, after consideration by—

The CHIEF JUSTICE. This prisoner was tried before Mr. Justice *Dickinson*, at the late Bathurst assizes, on a charge of assault on a female, with intent to commit a rape. The prisoner, at the time of the offence, was intoxicated. His Honor previously, on repeated occasions, instructed the Jury in similar cases, that, in judging of the intention, they should take the fact of the prisoner's drunkenness, at the time, into consideration. In deference, however, to supposed decisions which I had communicated to him, Mr. Justice *Dickinson* in this case told the Jury, not to consider the prisoner's intoxication as any test of intention. But, for the purpose of having the question settled, His Honor reserved it for the opinion of the Court.

We have fully considered this very important question, and have looked into all the cases bearing on it, including those of *Grindley*, cited in and overruled by *Carroll's case* (2); the cases of *Thomas* and *Meakin*, in the same book (3); *Cruse's case* (4); *Monkhouse's case* (5); and the case of *Moore* (6); also a case, not elsewhere reported, *Regina v. Matthews*, before Mr. Baron *Alderson*, on the Norfolk circuit, on July 23rd, 1847, *Times* newspaper.

And the authorities appear to us incontrovertibly to establish the position, in accordance with Mr. Justice *Dickinson's* former rulings, that, in cases where intention forms a material ingredient, as a question

(1) *The Sydney Morning Herald*, Oct. 29, Nov. 17, 1853. (2) 7 C & P 145.
(3) *Ibid.* 817 and 297. (4) 8 C & P 546. (5) 4 Cox C. C. 56. (6) 16 Jurist
750.

1853. of fact for the Jury, in the crime charged, drunkenness *is* a matter to
 REGINA be taken into account. This prisoner, therefore, the Jury having
v. been told that his intoxication was not to be considered at all, must
 RYAN. be discharged.
 Stephen C.J.

It appears, however, to Mr. Justice *Therry* and myself, that the fact of intoxication is no further or otherwise to be considered, than in reference to the inquiry whether the accused was thereby, in the opinion of the Jury, rendered unable to form any specific intention. It is undoubted law, most fortunately for the community, that drunkenness is no excuse for crime. For every act done, therefore, to the extent of the injury thereby occasioned, a drunken man is as much responsible as he would be if sober. If death should ensue from any such act, the drunkard will be answerable for the homicide, as entirely as a person in the full possession of his faculties. The actual intention of the accused, or whether he had any intention at all, in such a case, would be immaterial. If, because of his intoxication, the question could be regarded whether the prisoner really contemplated the result, there would (to use the language of the learned Judges in *Carroll's case*,) be no safety for human life.

In cases, however, such as the present, where the crime is statutory, and intention is essential to the charge, the fact of drunkenness may undoubtedly afford a test, occasionally, of person's intention, for he may have been so affected, as not to know what weapon he was using, or whether he used any, and to be unable, in point of fact, to form any intention at all. But, if the test is sought to be applied further, we must, with all possible respect and deference, express our utter dissent. The question would become one of physics, and not of law. Who could judge of a drunken man's motives, designs, or feelings, at a given moment, or in the doing of a particular act, if the usual and only known *indicia* and means of deciding, (that is to say, those which form the test and guide, in the case of men who are sober,) were removed? Who could ascertain the exact degree of drunkenness, which the accused had attained, and by what rule could any jury determine, that in such a stage drunkards are less apt to be operated on, by the passions which are known or concluded to actuate sober men, doing the same things. But if, in favour of drunkards, the usual rules are to be departed from, so that *they* shall not be, although sober men are, taken to intend the natural consequences of their acts, what rule can be substituted? For juries, before they could decide, would require to know not merely the extent of inebriation, but how the particular individual is ordinarily operated on by it. In some men,

liquor taken to excess appears to arouse, or aggravate, every evil temper. In others, it may excite feelings less malicious or angry, than if they had remained sober. What, then, is to be the guide, what the test in such cases?

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There seems no limit to general insecurity, and none to impunity for drunkenness, if the rule be once broadly laid down, that intoxication is to be, in all cases, and without restriction, a test of the intent charged. A man voluntarily makes himself a drunkard. He may render himself so purposely, without the possibility of detection, in order with impunity to commit crime. Inflicting, when drunk, some grievous injury dangerous to life, with the preconceived design to kill, he may escape conviction, on the ground that, because of his intoxication, he probably had no such design, although the circumstances may be such, that had the man been but sober, or a little less, or a little more intoxicated, or less addicted to violence when drunk, no sane person would doubt as to his intention for one moment. If, moreover, the fact is to be regarded in cases of intention, the subject of positive enactment, it seems impossible to exclude it as a test, equally, in cases of manslaughter, intent to defraud, and other similar cases. The mischiefs of such a rule, so uncertain and varying, yet so extensive in its application, would be intolerable.

But, confined to the mere question, was the person so drunk as to have no power to form any specific intention, which is the exemplification of the rule given alike by Mr. Justice *Patteson* in *Cruse's case*, and by Mr. Justice *Coleridge* in *Monkhouse's case*. Mr. Justice *Therry* and myself conceive that drunkenness, in cases where intention is material, may properly be considered by the Jury in determining whether there was any such intention. We think that in cases of shooting at, cutting, wounding, assaulting, or the like, with intent to murder, do grievous bodily harm, commit rape, or effect some other result, the Jury should be instructed that they must find the specific intent charged, and that, in considering the evidence as to that intent, they should find only (if the prisoner was intoxicated) whether he was so much intoxicated as not to have been able to form any specific intent.

Mr. Justice *Dickinson* is of opinion that the fact of drunkenness, as affording a test of the accused's intention, should not be so restricted in its application. His Honor thinks that the Jury should be instructed, in terms, to find the specific intent charged, and that, in determining that question, they are to consider the evidence of intoxication with the other facts disclosed by the witnesses.

Conviction quashed.

1853.

WALSH v. M'DONOUGH. (1)

Dec. 13.
Stephen C.J.
Dickinson J.
and
Therry J.

Malicious prosecution—Evidence—"Malice"—Defendant's belief in plaintiff's guilt—New trial.

The defendant, in an action for malicious prosecution, cannot be asked directly whether he acted maliciously, but he may be asked whether, at the time of the prosecution, he believed in the truth of the charge.

Where there *was* before the Jury, however, an affidavit by the defendant, wherein he had actually sworn to the plaintiff's guilt, but the defendant's *direct* evidence as to his *belief* had been excluded,

held (Therry, J. *dissentiente*), the defendant was entitled to a new trial.

NEW TRIAL MOTION. The action was for malicious prosecution, and was tried before Therry, J., and a jury of four, a verdict for the plaintiff of 40s. being returned.

Darvall, moved to make the rule absolute. The Judge at *nisi prius* had improperly rejected the evidence of the defendant, as to his having a *bona fide* belief of the plaintiff's guilt at the time of commencing proceedings against him.

Broadhurst, for the plaintiff, *contra*. It was for the jury alone to judge of the defendant's belief from all the circumstances, and not from any statement of his own. But even if the evidence had been improperly rejected, there was no probability of a different result, for the jury had actually before them the affidavit of the defendant, wherein he had actually sworn to the plaintiff's guilt.

The COURT granted a new trial, costs to abide the event. There were two questions for decision in a trial of this nature. First, whether or not there was, in fact, reasonable and probable cause for the prosecution? and secondly, whether, if there was no such cause in reality, the defendant had a *bona fide* belief in its evidence? The gist of the case was the existence or non-existence of malice; and this question was to be decided by the decision of the jury upon facts. The defendant could not be asked directly as to whether he had acted maliciously or not. He might nevertheless be asked whether, at the time of the prosecution he believed in the truth of the charge, for this

(1) *The Sydney Morning Herald*, 14th December, 1853; and 6 S.C.R. 393 Note.
Cited 6 S.C.R. 393.

was a fact from which the jury might or might not infer the absence of malice. This was not in itself any proof that malice was wanting, for a man might prosecute an offence from the most malicious motives, although he might really believe the party to be guilty. As to the question of there being no probability of a different result the Court was not unanimous. Two of their Honors held that, as the direct evidence of a defendant's belief had been excluded, the attention of the jury might have been withdrawn from the affidavit alluded to. The third Judge, however (Mr. Justice *Therry*), did not think that under the circumstances there was any probability of a different result, the defendant's affidavit having been before the Jury.

1853.

 WALSH
 v.
 M'DONOUGH.
The Court.

Rule absolute for new trial.

1854.

[IN EQUITY.]

Jan. 18.

Stephen C.J.
Dickinson J.
and
Therry J.

SMITH AND WIFE v. DAWES AND OTHERS. (1)

Crown grant—Grant “in trust”—Absence of words of “inheritance”—“Devises in trust for”—Statute of uses—Resulting trust in the Crown.

In a Crown grant to certain persons, “*devises in trust for W., their heirs and assigns*” to hold to them “*as such devisees as aforesaid, their heirs and assigns for ever*,” the words “*devises in trust for W., &c.*,” are not words of description only, and W. is named as a person taking a beneficial interest. In the absence of words of inheritance, W. only takes a life interest thereby.

The case is substantially the same as if the grant had been to the said persons and their heirs, *in trust for W.*, in which event the statute of uses renders them mere conduit pipes for the vesting of the legal estate, for life, in W.

On the death of W., the inheritance is in the Crown, as on a resulting use by implication. (*Attorney-General v. Ryan* (2) followed).

THE reserved judgment in this case was delivered, January 19, by—

THE CHIEF JUSTICE. This is a proceeding in equity, to obtain a declaration from the Court, that the defendants *Dawes* and *Foster*, who are grantees from the Crown of land in Bligh-street, in Sydney, are trustees for Mrs. *Smith*, and to direct them to convey the land to her, or as she or her trustees shall direct. The Attorney-General is made a party, to protect the interests of the Crown. (3)

The circumstances of the case are very peculiar. *Samuel Foster* purchased the land in question, in the year 1813 or 1814, and occupied it by himself, his agent, or tenants, up to the time of his death (he being then in England) in 1819. By his will, *Foster* devised all his property to trustees, for the use of his infant daughter, the now plaintiff, Mrs. *Smith*. From that time, it would appear, their or her agent in the Colony let the land, up to the year 1823, when a Mr. *Wynder* obtained possession of it (as he states) under that individual. Into whose hands it next fell, we have no evidence. In 1832, however, one *Donnison* was in possession, and being ostensibly the proprietor, his interest in the land was sold by the Sheriff, in that year to

(1) *The Sydney Morning Herald*, Dec. 15, 1853; Jan. 19, 1854. (2) *Ante*, p. 719. (3) On the part of the Crown all interest was disclaimed, and it was stated that the land would be confirmed to which ever party might appear, in the opinion of the Court, best entitled to it.

Frederick Wright Unwin, who resold to *Samuel Terry*, and the latter to *Mary Reynolde*, who devised it to the defendants *Dawes* and *Foster* (together with one *Edwards*, now absent from the Colony) in trust for her daughter *Harriet Weaver*, but with what further limitations, we are not informed. In 1834, these parties applied to the Commissioners of Claims, for a grant of the land; but what evidence they adduced, or what representation they made, to show title in *Donnison*, or to deduce a title (through him or otherwise) from *Wynder*, whose possession in 1832, unexplained, might have been deemed sufficient evidence of title in *him*, does not appear. The Commissioners, however, as we infer from their report, dated in December, 1835, must have had *some* evidence on these points, or one of them, and, the claim being wholly unopposed, they certified in favour of the defendant's title. The grant now in question was issued, accordingly, bearing date the 7th December, 1836.

1854.
SMITH
v.
DAWES.
Stephen C.J.

In May, 1837, the plaintiffs, in ignorance of the actual issue of that instrument, preferred *their* claim to the land. The Commissioners, not aware that the grant had issued, entertained the claim, and, after hearing the defendants (then equally ignorant of the fact, apparently), and taking evidence as to *Wynder's* and *Donnison's* occupation, *both* of whom were shown to have come in under *Mrs. Smith*, or her agent, they reported in favour of the new claimants, and that the former recommendation was erroneous. Upon this, it seems, the grantees were advised (or were willing) to surrender their estate, but a compromise having been entered into between their *cestui que trust* *Harriet Weaver*, and the complainants, in the course of the year 1837, by which she recognised their title, and became tenant under them of the premises, nothing more was done. In fact, the plaintiffs have ever since been in possession of the land. *Mrs. Weaver* is now dead, and the defendants are advised not to take any active step in the matter. A judicial decision, therefore, becomes necessary, and the defendants simply submit themselves to the Court.

The grant is to *William Dawes*, *Thomas Foster*, and *Thomas Dyer Edwards*, "devisees in trust for *Harriet Weaver*, their heirs and assigns" to hold to them, "as such devisees as aforesaid, their heirs and assigns for ever." It contains no declaration, otherwise than as aforesaid, as to the particular interest of *Mrs. Weaver*, or what or whose devise is referred to; nor is there any limitation over, in the event of her death. The instrument contains the usual clauses, providing for buildings by the grantees, and the payment of quit-rent; and there is a clause or proviso (on the effect of which, however, the

1854. plaintiffs offered no argument), that the "lawful right of all parties
 SMITH other than the grantees, in the land granted, shall enure and be held
 " harmless," anything in the grant notwithstanding. The plaintiffs
 DAWES. insist that the grant is void for *uncertainty*, but, if not, then that the
 Stephen C.J. grantees hold for the parties entitled, namely, *Samuel Foster's* representatives. The grantees, on their part, suggest that any estate vested in them, if any, is by *Harriet Weaver's* death at an end.

We are of that opinion, and that this case, in effect, is not distinguishable from the *Attorney-General v. Ryan*, in this Court (4). The limitation there, no doubt, was in terms less removed from ambiguity, for it was to the grantees, and their heirs, "*in trust for*" a third party, whereas here it is to the grantees, "*devisees in trust for*" the third party, with the words "and their heirs" then following. We cannot infer, however, that the words "devisees in trust for *Harriet Weaver*" are words of description only; for, unless she was named as the person beneficially interested, what is there to take this case out of the rule, that without words of inheritance added, the party takes an interest for life only. It could hardly be contended that the *grantees in trust* were to take beneficially. If not, they took (or were intended to take) the land, only for *Harriet Weaver's* life. Had the grant been, in terms, to the defendants and their heirs, *in trust for* her, the case would have been clear, that they were conduit pipes only, by force of the Statute of Uses, for the vesting of the legal estate, for her life, not in them but in their *cestui que use*. But a difficulty is certainly introduced by the insertion of the word *devisees* before the words "in trust." We think, however, that substantially the case is the same, and that, as there is no reason for their having the legal estate, at any time, and the interest or estate of *Weaver*, there being no words of inheritance annexed to the latter, terminated with her, the grantees had none at her death but that, on that event, the inheritance was in the Crown, as on a resulting use by implication. See the authorities, in the case already cited.

The rule obtained in this case, therefore, must be discharged, and, as the defendants have advanced no claim, and offered no opposition, and are unnecessarily brought before the Court (except, indeed, for the plaintiffs' benefit, in a view to an authoritative declaration, on which to found proceedings elsewhere), they are entitled to their costs.

We neither express no desire to intimate an opinion, as to the power of this Court to rectify erroneous conclusions or correct grants issued

by the Crown upon conclusions, formed by the Commissioners for Claims, as, in effect, we have in this case been asked to do. The question is one of very great importance, and it demands the most mature consideration. Those on whom the duty may devolve on a future occasion of arguing it, will do well to consult the cases decided in this Court, of *Walker v. Webb*, in 1845 (5); of *Spencer v. Gray*, in 1848 (6); of *Terry v. Wilson*, in 1849 (7); and of *Clarke v. Terry*, in 1853 (8), in each of which the point will be found more or less entered into.

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Rule discharged, with costs.

(5) *Ante*, p. 253. (6) *Ante*, p. 477. (7) *Ante*, p. 522. (8) *Ante*, p. 753.

[IN EQUITY.]

1854.

Feb. 15.

TERRY v. OSBORNE AND ANOTHER. (1)

Stephen C.J.
Dickinson J.
and
Therry J.

Equitable Mortgage—Registration—5 Will. IV., No. 21, s. 8—Contribution—Parties.

H., being the owner of certain land in the county of Northumberland, for which a Grant had not yet issued, mortgaged the same, with other property, to the plaintiff in 1838, by a deposit of the deeds with a memo. of the loan, and a promise to execute a mortgage. This was not registered. In 1843, H. conveyed this land among a large number of properties (by a registered transfer) to the Bank of A., from which the defendant O. purchased, and a Grant was issued to O. in 1851 in accordance with the recommendation of the Commissioners.

Held, the plaintiff was a mortgagee within the meaning of the Act, 5 Will. IV., No. 21, s. 8, and the equitable mortgage had the same effect as if the Grant had issued before the date thereof. Under the terms of the conveyance to the Bank the latter took no more interest in the land than H. then had. The plaintiff, however, could not make the defendants liable for the whole of her claim as mortgagee, inasmuch as the proprietors of the other lands included in the mortgage were liable to contribute. These should be made parties, in order to be present at the account.

EQUITY APPEAL. This was argued, Dec. 24, 1853, by the *Solicitor General, Foster, and Broadhurst*, for the appellants, the defendants below, and *Darvall*, for the respondent.

The reserved judgment of the Court was delivered, Feb. 15, 1854, by

The CHIEF JUSTICE. This is an Appeal in Equity, from a Decree made by the Primary Judge, by which the plaintiff is declared to be an equitable mortgagee, under a deposit of deeds and memorandum in writing, of lands in the County of Northumberland, granted by the Crown to *Osborne*, and by him conveyed to the other defendant *Eales*. The original locatee of the land, holding the same under the usual promise of a grant, was one *Moran*, who sold (or from whom, by some other means, the land passed) to *Bettington*, who conveyed to *J. T. Hughes*; under whom, both parties alike claim. And the plaintiff's case is, that *Hughes* borrowed from her £2,000, in the month of March, 1838, on the security of *that and some other land*; he thereupon depositing the deeds of the properties, with a memorandum of the loan and its terms, accompanied by a promise to execute a mortgage, at some future day. Soon afterwards the plaintiff took possession of *Moran's* location (the property now in question), and she has retained

(1) *The Sydney Morning Herald*, Dec. 26, 1853; Feb. 16, 1854.

such possession ever since. The memorandum of deposit was never registered, however, under the Act 6 Geo. IV, No. 22, and the plaintiff has never obtained any further security by formal mortgage.

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The defendants' case is, that *Hughes* conveyed this land, as they insist, to the Bank of Australia, in April, 1843, together with a great number of other properties; and that the defendant, *Osborne*, having purchased from the Bank on the 6th January, 1851, as he alleges, all the estate formerly of *Hughes* which there then remained undisposed of, obtained from the Bank (on the 22nd January) a conveyance of that estate, including the land in question. And the defendants contend, that the supposed previous equitable mortgage, if it existed at all (a fact which they deny), cannot affect their title, because the Bank, and at any rate *Osborne*, had no notice or knowledge of any such security, and *Hughes's* registered conveyance to the Bank, therefore, had priority over it.

Stephen C.J.

With these facts before them, the Commissioners for Grants reported in favour of *Osborne*, in opposition to the claim of Mrs. *Terry*; and, on the 30th December, 1851, a grant was issued to him accordingly. And the defendants insist, that such report or recommendation, by a tribunal created for the purpose of settling claims to land (in cases where no grant has previously issued), is equivalent to a judicial decision, and final between the parties. On the other hand, the same statute which created that tribunal, it was answered for the plaintiffs, expressly gives effect to *mortgages*, notwithstanding the issue of a grant, if the land would have been bound thereby, in case the grant had issued previously.

There are other facts in the case, introduced either by the plaintiff or the defendants. One is, the sequestration of *Hughes's* estate as insolvent, in September, 1843, and a release to the plaintiff in December, 1844, by the assignees of that estate, of their supposed equity of redemption, in the several mortgaged properties. That release, however, clearly conveyed nothing; for, whatever *Hughes* had in the premises, was (as we have shown) conveyed by him to the Bank, by the deed of April, 1843. Or, at the utmost, the plaintiff acquired by it the assignee's right to redeem *as against the Bank*, the conveyance of 1843, itself being by way of mortgage only. Another matter insisted on for the plaintiff was, that the conveyance to the Bank was void, under the 5 Vic., No. 17, s. 8, as having been made at a time when *Hughes* was insolvent, in preference of one existing creditor to another. The question, also, of knowledge or negligence in the Bank, at that date, as affecting their right to hold, or convey, except only subject to

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the plaintiff's mortgage, although unregistered, was much dwelt on in the argument. In the view, however, which we take of the case, all these matters become immaterial.

Stephen C.J.

The question, moreover, which arose in the case of *Osborne v. Campbell*, whether the purchase by *Osborne* was (as alleged by him) of all *Hughes's* then unsold estate, or was merely of all the remaining *insolvency* assets, derived by the Bank from the assignee's, under a deed dated the 6th January, 1846, has not been made in this case. So that the defendant *Osborne*, we shall assume, took from the Bank of Australia in 1851, under the conveyance of 22nd January, whatever the Bank then had to give him. And the first question accordingly is, what did the Bank acquire in *Moran's* location, by the conveyance of April, 1834 ;—the *land* itself, or only *Hughes's interest* in the land ?

That conveyance recites that *Hughes* was "seized of or otherwise well entitled to, or interested in" divers estates and lands, and that he was largely indebted to the Bank, and that it had been agreed, before the extension of the debt to its then amount, that he should execute a mortgage of "all his real estates and hereditaments" as therein mentioned :—and then *Hughes* grants, bargains, sells, releases, and assigns and transfers, to the Chairman of the Bank (in accordance with the Act of Council in that behalf) on behalf of the Bank, and to his heirs, executors, or administrators, according to the nature of his interest therein, all his lands and hereditaments (or his interest therein) by the following words : "All and singular the lands, hereditaments, and premises, of or in which the said *Hughes*, or any person in trust for him, is seized or possessed, or otherwise entitled, in possession, reversion, remainder, or expectancy, or wherein he has any equity of redemption, or other estate, right, or interest, at law or in equity, situate and being in the City of *Sydney*, or elsewhere in the County of *Cumberland*, by whatever description or title the same may be called or known." Then follows an exception of such lands, situate as aforesaid, as were comprised in another deed specified, "All which hereditaments are intended, for convenient reference, to be comprised in the schedule hereunto annexed, yet so, nevertheless, that no omission in them, of any hereditaments of the said *Hughes*, situate as aforesaid, shall control or abridge the general description hereinbefore contained :—" And also the other lands and hereditaments, *situate elsewhere in the Colony*, which are particularised in the said schedules." Then follow the usual words of amplification, all houses and easements, all reversions, and remainders, and all the conveying party's right, title, and interest, &c. Two schedules are annexed. In the first *Sydney*

properties exclusively appear to be inserted. Only one of these is mentioned as being under mortgage. In the second schedule it would seem, therefore (and it was indeed not denied), the *Cumberland* properties, as well as other *country* lands, generally, are enumerated promiscuously. Among the properties, comprising a vast number, the estate in question occurs, described as "*Moran's grant*" simply. And not one of the whole is stated to be incumbered.

It was strenuously maintained for the defendants that as *Moran's* land was not in *Cumberland*, and as the words "or wherein he has any equity of redemption," refer (in terms, at all events), only to lands *there*, or in *Sydney*, and there is no such qualification expressed, with respect to lands *situate elsewhere*, but these latter are in separate part of the clause, all such, and *Moran's*, of course, among them, must be taken to have been conveyed absolutely. Were this so, the conveyance no doubt might (and, in the absence of fraud in the Bank, or matter equivalent, it would) defeat the plaintiff's unregistered mortgage, by the express provisions of the Registry Act. But we do not think that the conveyance can be so construed. The *Sydney* and *Cumberland* properties, it appears to us, were separately mentioned for the sake of the *exception* following, which exclusively refers to land *there situate*. And then, that exception having been introduced, the words, "also the other hereditaments situate elsewhere," naturally follow, not as indicating any more enlarged estate, or interest, possessed or meant to be conveyed in these, but solely as marking a more extended locality. Nothing could justify the supposition that something beyond this was intended short of proof, which the facts show to be impossible, that *Sydney* and *Cumberland* properties alone were mortgaged, the *other country* properties, without exception, being free from incumbrance. But there is no assignable reason why this debtor should have made the supposed distinction. It is clear to our apprehension that *Hughes* meant by the deed, he being embarrassed, but possessed of enormous landed property, held in various ways to pledge whatever interest he had in it, he apprising the Bank, as the instrument itself does, that (as to *some* of the lands at least) that interest was qualified only. The mixing up of all the country properties, including those in *Cumberland*, in the same schedule, tends to strengthen our opinion. There is certainly an absolute covenant for enjoyment most inconsistently introduced, for how could *every* property (without exception, as *Hughes* is made to undertake), in the face of a deed and schedule so worded, be enjoyed free from incumbrance? On the other hand, there is no covenant whatever for *title*. Our opinion is founded, however, on the general terms of the deed in the

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conveying part, which, like a sequestration, or a *flat* in bankruptcy, transferred all that there was in the party lawfully to convey, and nothing more. The covenant for enjoyment, indeed, might be taken to mean only that incumbrances should be paid off; or, that whatever was conveyed (an equity of redemption, for example,) should be enjoyed; not that the lands described, without regard to the extent of *Hughes's* interest therein, should be so enjoyed.

The position of the Bank, therefore, as to *Moran's* location, was simply that of *Hughes* at the time of his conveyance to the Bank. That is to say, the Bank had (or thereby became entitled to) the legal estate; but the plaintiff was entitled, by virtue of her memorandum, to have that legal estate that transferred to her, by way of mortgage. Or, by the practice of the Courts, in case of equitable mortgage, she might claim (as she does in this suit) to have the land sold, to satisfy the amount due to her.

A formal difficulty is introduced, by the circumstance that the legal estate, until the recent issue of the grant, has in fact been in the Crown. But the difficulty is formal only, and since equity regards the substance of things, the relative rights of the parties remain unaffected by it. Practically, and in general acceptation, the owner of the land in March, 1838, was *Hughes*; and after that date the plaintiff was its equitable mortgagee. The remaining interest of *Hughes* passing first to the Bank, and then to Osborne, the latter was entitled to the grant as their representative. But he could acquire from neither, by his purchase in 1851, any greater right or interest than the bank itself then had to confer. The defendant consequently cannot escape the liability of *Hughes*, or the bank, to perfect Mrs. *Terry's* mortgage, unless a new position was gained by him, or a new right given by the issue to him of that grant.

By the 5 Will. IV, No. 21, s. 8, it is enacted that "all mortgages which would have bound the lands in case grants thereof had been given, under the Great Seal, before such mortgages were made or given, shall have the same force and effect with respect to such lands, after grants thereof made and delivered, as if the same had been made and delivered before the dates of such mortgages." The only question then is, as to this point, was the transaction between *Hughes* and the plaintiff in March, 1838, a mortgage within the meaning of the enactment; that is to say, in case a grant thereof had thenceforth been given. As observed in the case of *Hale v. Morris* (2), 3rd Term, 1849. the clause under consideration is very loosely worded; and perplexing

(2) *The Sydney Morning Herald*, December 19, 1849.

questions may, therefore, be expected to arise upon it. But we are clearly of opinion, that an *equitable* mortgage, by deposit of title deeds, and written memorandum, is as entirely within the enactment, in letter and in spirit, as the most formal instrument under seal.

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The objection, that a mortgage by deposit and memorandum only affects the conscience, and does not bind the *land*, is one scarcely worth notice. No doubt the transaction gives no title at law. But neither would any conveyance whatever, in the then state of things, have given such a title. If, however, we assume that *Hughes* had at the time a grant, the transaction would *then* have "bound the land," in this jurisdiction at least, and in the sense in which equity regards such matters. The Legislature, we are satisfied, could not have used the term in its strict legal sense; for why should equitable mortgages have been refused protection? And what, after all, is the difference between the two species, but this, that the one transaction affects the land, so as to convey a legal estate, while the other affects it (in other words, is a charge) precisely to the same extent, without conveying any more than an equitable estate? At law, in the former case, the mortgagee is strictly the owner. But, in equity, in each case alike, the property is still the mortgagor's, the debt being the substantial transaction, and the conveyance operating to create a lien only. The debt, in other words, is the principal, and the land the incident. Surely a *lien* is something which "binds" the land. See the cases in 5, *Jarm. Byth.*, 109-112.

It follows that the defendant *Osborne* conveyed to *Eales*, by the provisions of the enactment, an incumbered property only, and that equally in the hands of either, the land is liable to satisfy the incumbrance.

The question, however, whether it can be so made liable in this suit, as it now stands, and without contribution from the other properties, which were alike included in the same mortgage, is one of much more difficulty. The result of our judgment is, after a review of all the authorities, that the plaintiff cannot exclusively make this land liable, and that the proprietors, severally, of the other lands included in the charge, must be called on to answer her claim, jointly with these defendants. There were, it appears, three separate estates thus included, all equally made liable to the debt, and not one created the primary, with the others the subsidiary securities. All these are now, probably, in different hands, and why should this plaintiff have the power to select which shall satisfy the debt, and which be exempted from it? The fact may be, even, that another of the three properties is in her own hands. On what principle shall she be permitted, passing that by, to seek satisfaction from *Moran's* land alone? The Primary Judge, not disputing that there might be a claim for contribution, as

1854. between the properties, supposing the *three* to have come to *Osborne*,
 TERRY or more than the one sold to *Eales* to have so come, regarded the
 v. matter as one for subsequent adjustment. But the particular facts
 OSBORNE. now suggested, respecting the ownership of the two other mortgaged
 Stephen C.J. properties, and supposing them to have become vested in the plaintiff
 herself, or in parties not claiming under *Osborne*, or the Bank, appear
 to have escaped observation.

The rule as to contribution, a branch of the law of the same nature with that of marshalling, is thus stated in *Spence's Equity*, vol. 2, p. 837: "Where several estates, or parts of estates, are comprised in one mortgage, and they devolve on or become vested in (by devise, descent, or otherwise) several persons, the general rule is that each estate or part, according to its value, shall bear a proportionate part of the mortgage money." See the note to *Averall v. Wade* (3), the cases and notes in 5 *Jarm. Byth.*, 376, and 9 *ibid*, 122 and 129. But our judgment proceeds on the principle, as to this point, that the security here being jointly on three properties or more, for one sum of money, which all are bound rateably to satisfy, all the proprietors should alike be called on, in the first instance, in order that each may be present at the account, in the taking of which all are interested. For the plaintiff having long been in possession of one of these estates, and perhaps of a second, under her mortgage, may to a great extent have been paid, and the owners or owner not before the Court, and who may know nothing of these proceedings, must not incur the risk of prejudice (when eventually made to contribute), by the possible collusion or negligence of the present litigants, in the taking of such account. *Stokes v. Clendon* (4).

The decree of the Primary Judge will, therefore, be altered, in directing relief, and an account, as the case now stands. On the other hand, we shall not dismiss the Bill, for the objection as to want of parties, has not been taken by the defendants. The cause will stand over, without any order as to costs on either side, with leave to the plaintiff to amend, by adding parties, or otherwise, as she may be advised.

It will be collected from what precedes, and indeed we intimated as much during the argument, that we entertain no doubt as to the existence and execution at the date alleged, of the memorandum of deposit relied on. The conclusions arrived at, it will be observed, render it unnecessary for us to notice the other matters introduced.

Order accordingly.

(3) *Ll. and G., temp. Sugden*, 264.

(4) *In notis*, 3 Swans, 150.



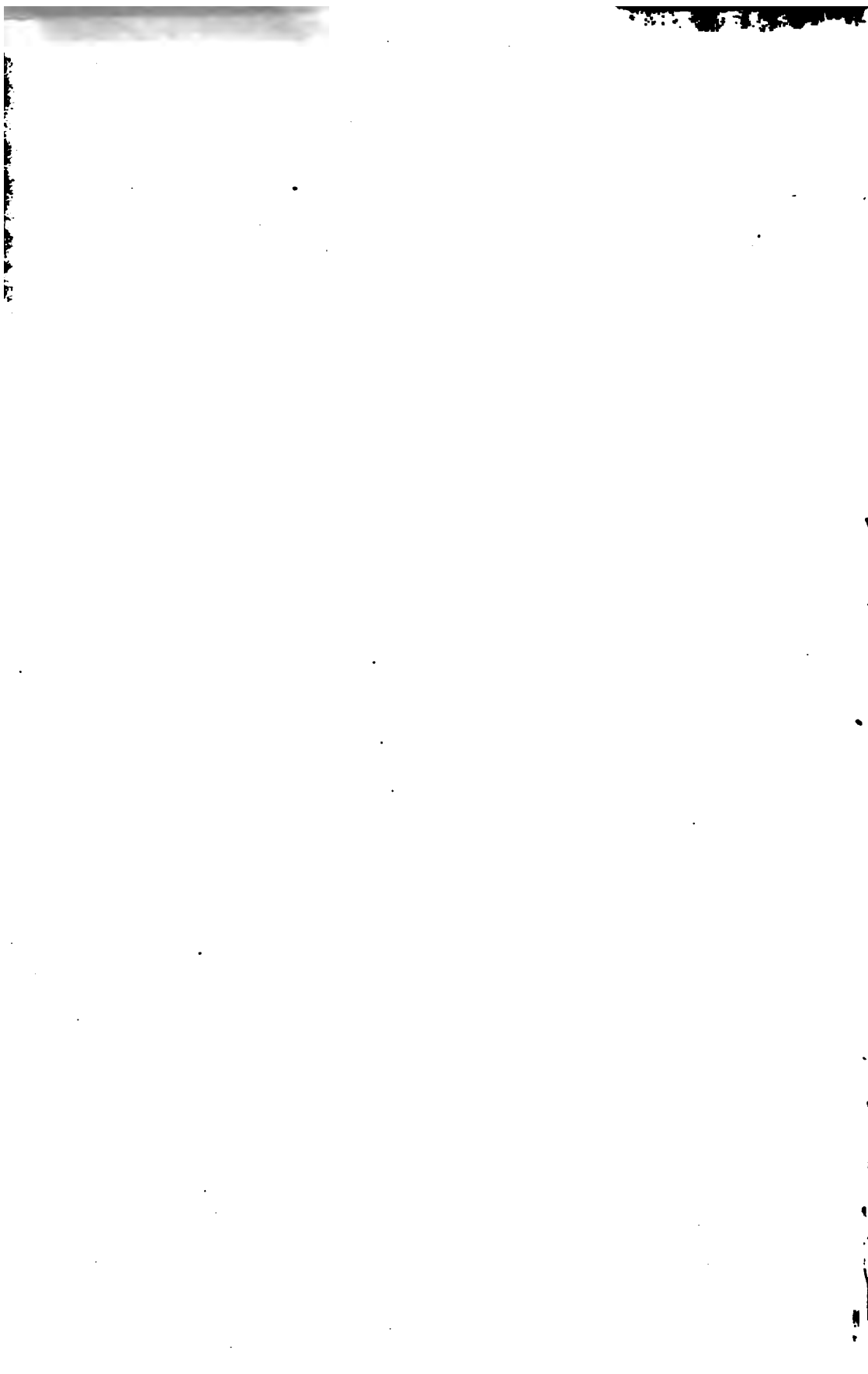
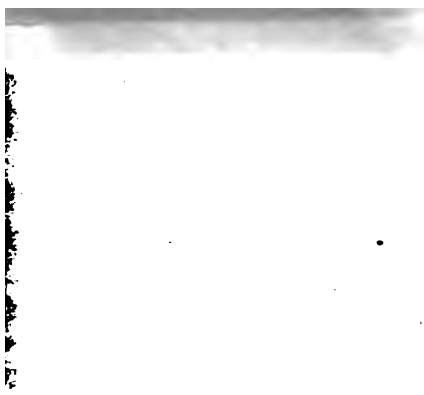
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